Supreme Court, U.S.
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91-1867

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN M. SPEAR and SPEAR PRINTING CO., INC.,
Petitioners,

v.

TOWN OF WEST HARTFORD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a town's deliberate filing of a frivolous RICO suit against a newspaper editor and publisher, predicated solely upon the allegedly "extortionate" publication of an editorial criticizing the town, violate the first amendment?

2. Is malicious government prosecution of a frivolous civil lawsuit in retaliation for the exercise of first amendment rights actionable under 42 U.S.C. § 1983?

3. Does a town's deliberate filing of a frivolous RICO suit against a newspaper editor and publisher, predicated solely upon the allegedly "extortionate" publication of an editorial criticizing the town, "shock the conscience" for purposes of a due process claim under the fourteenth amendment?

PARTIES

The petitioners were the appellants below and the plaintiffs in the district court. The respondent was an appellee below and a defendant in the district court. The other appellees below and defendants in the district court were Marjorie S. Wilder, Robert R. McCue, and Summit Women's Center West, Inc.

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the court of appeals is reported as *Spear v. Town of West Hartford*, 954 F.2d 63 (2d Cir. 1992). The decision of the district court is reported as *Spear v. Town of West Hartford*, 771 F. Supp. 521 (D. Conn. 1991).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its judgment in this case on January 13, 1992. The court of appeals denied petitioners' Petition for Rehearing on February 21, 1992. This Court has jurisdiction under 28 U.S.C. § 1245(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The Civil Rights Act of 1871 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

A newspaper editor and publisher printed an editorial that was sharply critical of a town. The town then filed --and later dropped—a frivolous RICO action predicated solely upon the publication of that editorial. (The town alleged that the publication of the editorial constituted "extortion" under the federal Hobbs Act.) The newspaper and editor then brought the present civil rights action against the town.

The newspaper editor and publisher—petitioners in this Court—filed suit in federal district court under 42 U.S.C. § 1983 and pendent state claims. Petitioners requested damages and declaratory relief against, *inter alia*, the respondent Town of West Hartford.

A. Statement of Facts [1]

The *Orange County Post* is a weekly newspaper published in Washingtonville, New York. Cplt. ¶ 5 (App. 29a). On April 4, 1989, petitioner John M. Spear, editor of the *Post*, published an editorial in the *Post* entitled "Northern Red Necks." *Id.* ¶¶ 5, 14 (App. 29a, 32a). The editorial accused town law enforcement authorities of police brutality and other abuses in connection with protests at an area abortion facility. (A copy of the editorial is included as Appendix E to this Petition. *See* App. 45a.)

On June 29, 1989, the Town of West Hartford commenced a civil RICO action in federal court naming Spear and Spear Printing Company,[2] among others, as defend-

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[1] The district court dismissed petitioners' complaint. For purposes of review, therefore, the allegations of the complaint are taken as true and construed favorably to the petitioners. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

[2] Petitioner Spear Printing Co., Inc., is the publisher of the *Post*. *Id.* ¶ 6 (App. 30a).

ants. *Id.* ¶ 21 (App. 33a). The sole basis alleged for the town's RICO suit against petitioners was the claim that the publication of the editorial, "Northern Red Necks," constituted predicate "extortion" under the Hobbs Act, 18 U.S.C. § 1951. Cplt. ¶¶ 23-27 (App. 33a-35a). The town's RICO complaint alleged in pertinent part as follows:

> On or about Tuesday, April 4, 1989, the Defendant Spear Printing Co., Inc., through its editor, the Defendant John M. Spear, deliberately and maliciously published an incorrect, defamatory account of the April 1, 1989 protest based upon reports given to him by the Defendant Catherine A. Jersey, another employee of the Defendant Spear Printing Co., Inc., who was one of the protesters arrested by West Hartford police on April 1, 1989 at the Summit Women's Center, in furtherance of the efforts of the Defendants and others to harass, intimidate and extort a less diligent or softened response from the West Hartford Police Department to future protest activities by the Defendants and others at the Summit Women's Center and elsewhere within the Town of West Hartford.

Id. ¶ 26 (App. 34a-35a) (quoting town's RICO complaint).[3]

The town's RICO suit forced petitioners to retain counsel and to incur legal fees and costs in their defense. *Id.* ¶¶ 22, 56, 71 (App. 33a, 40a, 43a). Petitioner Spear also suffered "fear, mental anguish and worry over any potential legal liability" which, Spear alleged, caused a "chilling effect" upon his rights to freedom of speech and press. *Id.* ¶ 58 (App. 41a).

During the course of discovery in the town's RICO action, Chief of Police Robert R. McCue, who as acting Town Manager had signed the verified RICO complaint of the Town of West Hartford, admitted that the Town

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[3] Although the town's complaint alleged that the editorial was "defamatory," the complaint did not present any claims for libel or defamation against petitioners. *Id.* ¶ 23 (App. 34a).

had no evidence against petitioners other than the fact that petitioner Spear had authored, and petitioner Spear Printing Co. had published, an editorial criticizing West Hartford police action. *Id.* ¶ 45 (App. 38a).

On December 6, 1989—five days after Chief McCue's deposition, and nearly six months after the filing of the original action—the town filed a second amended complaint that dropped petitioners Spear and Spear Printing Co. from the action. *Id.* ¶ 57 (App. 40a-41a).

The Second Circuit subsequently ruled that the town's RICO action against the remaining defendants was so patently without merit as to justify dismissal for want of federal subject matter jurisdiction. *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990). The Second Circuit described the town's claims as "blatantly implausible," *id.* at 102, and "bizarre," *id.* The court added that it would not "countenance [such] fanciful invocations of the draconian RICO weapon in civil litigation." *Id.* at 104.

B. Course of Proceedings

On August 22, 1990, petitioners filed the present lawsuit in federal district court against, *inter alia*, the respondent Town of West Hartford (App. 28a). Petitioners claimed that a government entity that brings a frivolous RICO suit against a newspaper editor and publisher, alleging as its sole basis that the publication of a newspaper editorial constituted predicate "extortion," violates the first amendment. Cplt. ¶ 60 (App. 41a); *id.* ¶ 58 (App. 41a). Petitioners alleged further that the town had maliciously prosecuted a baseless lawsuit against petitioners in violation of petitioners' constitutional rights, secured under 42 U.S.C. § 1983, to freedom of speech and press. *Id.* ¶¶ 60, 64 (App. 41a, 42a); *see also id.* ¶ 69 (App. 42a). Finally, petitioners claimed that such conduct by a government entity was "so egregious" as to "shock the conscience" and deny due process of the law to

petitioners in violation of the fourteenth amendment. *Id.* ¶ 59 (App. 41a).

On April 17, 1991, the U.S. District Court for the District of Connecticut dismissed petitioners' lawsut, holding that petitioners had failed to state a cause of action under 42 U.S.C. § 1983 against the town. *Spear v. Town of West Hartford*, 771 F. Supp. 521 (D. Conn. 1991) (App. 12a).

Rejecting petitioners' first amendment claim, the court declared that petitioners had failed to allege "any cognizable constitutional deprivation." *Id.* at 527 (App. 20a). The district court held that a victim of adverse government action has to allege some *subsequent damage to speech*—for example, "that Spear stopped writing editorials or that Spear Printing stopped publication" in response to the frivolous RICO suit. *Id.*

The district court also held that although § 1983 encompasses suits for vexatious *criminal* litigation ("malicious prosecution"), claims of vexatious *civil* litigation ("malicious abuse of process") are not actionable. *Id.* (App. 21a).

Rejecting petitioners' due process claim as well, the district court held that the filing of a frivolous RICO suit in response to editorial criticism in a newspaper does "not constitute conduct so egregious as to 'shock the conscience.'" *Id.* at 528 (App. 21a) (footnote omitted).

Petitioners appealed to the U.S. Court of Appeals for the Second Circuit. On January 13, 1992, the court of appeals affirmed the dismissal of petitioners' lawsuit against the town. *Spear v. Town of West Hartford*, 954 F.2d 63 (2d Cir. 1992) (App. 1a).

The court of appeals essentially adopted the reasoning of the district court. The court held that petitioners had not alleged a deprivation of constitutional rights because petitioners failed to allege some *subsequent damage to speech*, e.g., that Spear "had declined to write further

anti-abortion editorials" or "had toned down his writing on the subject." *Id.* at 67 (App. 8a). The court agreed with the district court that "section 1983 liability . . . may not be predicated on a claim for malicious abuse of process." *Id.* (App. 10a). The court of appeals also summarily agreed with the district court that the town's filing of a frivolous RICO suit, in response to an editorial, did not "shock the conscience" for purposes of a due process claim. *Id.* (App. 9a).

The Second Circuit denied petitioners' request for rehearing with suggestion for rehearing en banc on February 21, 1992. (App. 26a).[4]

REASONS FOR GRANTING THE WRIT

The question in this case is whether a governmental body may, with impunity, respond to editorial criticism in a newspaper by filing a civil RICO suit against the editor and publisher of that newspaper, alleging federal extortion, where the editorial is the sole basis for the lawsuit. Such misuse of governmental power is both outrageous and obviously inimical to freedom of speech and press. Nevertheless, the court below held that the editor and publisher stated no cause of action against the town under 42 U.S.C. § 1983.

This Court has long recognized "that 42 U.S.C. § 1983 creates a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured

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[4] The district court subsequently denied the town's request for an award of attorney fees under 42 U.S.C. § 1988, as prevailing defendants, against the petitioners. *Spear v. Town of Wset Hartford*, No. H-90-682 (AHN) (D. Conn. Apr. 16, 1992). The court did, however, award over $13,000 in attorney fees against petitioners, under § 1988, to a private abortion facility as a prevailing defendant. *Id.* This private facility had, in concert with the town, brought an essentially identical and equally frivolous civil RICO suit against petitioners. Cplt. ¶¶ 49-53 (App. 39a-40a).

The propriety of the district court's orders granting fees under § 1988 is not before this Court.

to them by the Constitution." *Memphis Community School District v. Stachura*, 477 U.S. 299, 305-06 (1986) (internal quotation marks and citations omitted).

In the present case, petitioners have invoked § 1983 in pursuit of damages and declaratory relief for the violation of their constitutional rights to freedom of speech, freedom of press, and due process. For the reasons set forth below, this Court should grant review of the decision of the Second Circuit affirming the dismisal of petitioners' civil rights lawsuit.

I. THE SECOND CIRCUIT CREATED A NEW AND ADDITIONAL ELEMENT FOR ASSERTED *PAST* VIOLATIONS OF FIRST AMENDMENT RIGHTS BY REQUIRING A PLAINTIFF TO ALLEGE *SUBSEQUENT* INJURY TO FREE SPEECH.

The Second Circuit has created, out of whole cloth, a new constitutional doctrine for asserted violations of federal free speech rights: according to the Second Circuit, a plaintiff must allege and prove that an allegedly unconstitutional act not only penalized *past* speech but also "chilled" *future* speech. This doctrinal innovation stands sharply at odds with the jurisprudence of this Court.

Petitioner Spear, a newspaper editor, wrote an editorial sharply criticizing the respondent town. The town countered with a frivolous RICO suit against editor Spear and the publisher of the newspaper, petitioner Spear Printing Co., Inc., alleging racketeering and predicate extortion. The only basis for the alleged RICO "extortion" was the newspaper editorial. Spear and Spear Printing Co. incurred legal expenses as a result of this lawsuit; Spear also suffered fear, mental anguish, and worry. These facts (which must be taken as true on a motion to dismiss) suffice to support a claim of compensatory damages. *Carey v. Piphus*, 435 U.S. 247, 255 (1978) (damages available under § 1983 where violation of constitutional rights causes compensable injury); *id.* at 264 (mental and emotional distress compensable under § 1983 upon

proper proof). These facts also suffice to support a claim, at the least, for nominal damages for the violation of petitioners' rights. *Id.* at 266-67. No further allegations were necessary.

Yet the Second Circuit held that petitioners' damages claim was deficient because ""Spear did not allege that he had declined to write further anti-abortion editorials, nor did he claim that he had toned down his writing on the subject." 954 F.2d at 67 (App. 8a). In other words, the Second Circuit insisted that Spear not only suffer damage for speaking, but that he subsequently cease or alter his speech.

This has never been the law. If a police officer assaults a picketer because of the message on the picketer's placard,[5] it would be no defense that the picketer subsequently continued to display the same message. Likewise, if a school district fires an employee for her protected expression of opinion,[6] it is irrelevant whether she persisted in expressing her views.

The new rule formulated by the Second Circuit, by contrast, means that governmental perpetration of tortious or even criminal conduct against those who exercise free speech is *not* actionable under § 1983 unless and until the injured individual forgoes the exercise his rights in response to governmental abuse. While this rule may make some sense in the context of an action for *injunctive* relief to protect *future* speech, it has no place in an action for the past infliction of damages.

This Court should grant the present petition to review the Second Circuit's drastic alteration of the law governing damage suits for violations of constitutional rights to free speech and press.

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[5] *Cf. Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975).

[6] *Cf. Givban v. Western Line Consolidated School District*, 439 U.S. 410 (1979).

II. THE SECOND CIRCUIT'S HOLDING, THAT VEXATIOUS CIVIL LITIGATION BY GOVERNMENTAL BODIES IS CATEGORICALLY OUTSIDE THE SCOPE OF § 1983, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The Second Circuit categorically excluded the possibility that malicious government prosecution of a *civil* suit could violate § 1983. This new, blanket rule conflicts with the decisions of other federal circuits.

The Second Circuit, while acknowledging that § 1983 liability exists for malicious prosecution of *criminal* litigation,[7] held that no such remedy is available where the malicious government litigation is *civil*, not criminal. 954 F.2d at 68 (App. 10a). Other federal courts of appeals, by contrast, have acknowledged that § 1983 may indeed provide a remedy for the abuse of civil litigation by government actors. *E.g., Beker Phosphate Corp. v. Muirhead*, 581 F.2d 1187, 1189 (5th Cir. 1978) (per curiam); *Tarkowski v. County of Lake*, 775 F.2d 173, 174 (7th Cir. 1985). And at least one federal court of appeals has upheld an award of damages under § 1983 specifically for the improper use of *civil* litigation to suppress free speech rights. *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544, 557 (5th Cir. 1988), *aff'g* 615 F. Supp. 916, 933-936, 941 (N.D. Tex. 1985) (state actors obtained un-

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[7] The federal courts of appeals uniformly hold that claims of malicious *criminal* prosecution can be actionable under § 1983. *See, e.g., NAACP v. Hunt*, 891 F.2d 1555, 1563 (11th Cir. 1990); *Torres v. Superintendent of Police of Puerto Rico*, 893 F.2d 404, 408 (1st Cir. 1990) (listing cases); *Dunn v. State of Tennessee*, 697 F.2d 121, 125 (6th Cir. 1982), *cert. denied*, 460 U.S. 1086 (1983); *Gunderson v. Schleuter*, 904 F.2d 407, 409 (8th Cir. 1990). In particular, government actors can be liable under § 1983 for the malicious institution of criminal proceedings designed to penalize the exercise of first amendment rights. *E.g., Losch v. Borough of Parkesburg*, 736 F.2d 903, 907-08 (3d Cir. 1984); *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979).

constitutional TRO against picketing).[8] *See also Andree v. Ashland County*, 818 F.2d 1306, 1313-14 (7th Cir. 1987) (suggesting that damages may be available under § 1983 for malicious civil injunction suit which seeks "palpably unconstitutional" relief or is brought "merely to suppress . . . expressive conduct").

The Second Circuit offered no rationale whatsoever for its novel and highly artificial distinction between malicious *criminal* and malicious *civil* litigation by government.[9] Nor are petitioners aware of any federal circuit that has similarly adopted the Second Circuit's rigid, categorical rule against § 1983 suits predicated upon malicious government litigation of *civil* claims.[10] This Court has not yet addressed this important question.

This Court should grant review to resolve the conflict between the Second Circuit and other federal courts of appeals over the actionability, under § 1983, of malicious civil litigation by government.

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[8] In the present case, as in *Howard Gault*, petitioners suffered from the imposition of an immediate, *ex parte* TRO. Cplt. ¶ 28 (App. 35a). As the Second Circuit noted, this TRO contained a broad disclaimer in which the district court "purported" not to infringe on any first amendment rights. 934 F.2d at 65. (App. 4a). Petitioners pointed out in their complaint, however, that the only act identified in the town's RICO complaint against petitioners was the publication of a newspaper editorial. Cplt. ¶ 29A (App. 35a). In view of this fact, it is difficult to see how the TRO *against petitioners* could *not* restrain free speech or press.

[9] The town's deliberately vexatious and punitive lawsuit accused petitioners of federal racketeering and extortion simply because petitioners published a neswpaper editorial that criticized the town. This RICO suit put petitioners in jeopardy of liability for treble damages and attorney fees. That the town's RICO suit was civil rather than criminal did not by any stretch of logic remove the crushing impact of this abusive government action.

[10] The Second Circuit cited *Havas v. Thornton*, 609 F.2d 372, 376 (9th Cir. 1979), in support of its new blanket rule. But *Havas* held only that damage to reputation is not actionable under § 1983. *See id.* at 374-76 (holding that case is controlled by *Paul v. Davis*, 424 U.S. 693 (1976)).

III. THE SECOND CIRCUIT ADOPTED AN EXTREME CONSTRUCTION OF THE "SHOCK THE CONSCIENCE" ELEMENT OF A DUE PROCESS CLAIM.

The Second Circuit rejected petitioners' due process claim under the fourteenth amendment on the basis that the conduct of the town did not "shock the conscience." 954 F.2d at 68 (App. 9a). In so holding, the court below adopted an extreme construction of this element of a due process claim.

This Court has held that the forcible pumping of a person's stomach by police in search of evidence so "shocks the conscience" as to violate the liberty guarantee of the fourteenth amendment. *Rochin v. California*, 342 U.S. 165, 172 (1952). The same rationale governs the present case.

This case presents a classic instance of extreme and outrageous government conduct. Petitioners Spear and Spear Printing Company did no more than dare to *criticize* the Town of West Hartford *in a newspaper editorial.* For that one act of pure speech, the town subjected petitioners to a RICO lawsuit accusing the petitioners of Hobbs Act extortion.

The Second Circuit has characterized the town's RICO and extortion claims as "bizarre," "blatantly implausible," and a "fanciful invocation[] of the draconian RICO weapon" in a manner that "affronts common sense," *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 102, 104 (2d Cir. 1990), when invoked against *physical obstruction* by anti-abortion protesters. When invoked in response to a mere *newspaper editorial*, the town's RICO and extortion claim truly should "shock the conscience" of any person with a basic respect for freedom of speech and press.

Unless the due process protections of the fourteenth amendment are to be limited to cases where the authors

of editorials are taken out and shot, the case at bar must be viewed as stating a constitutional violation.

This Court should grant the present petition to review the miserly construction of due process protection by the Second Circuit.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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May 20, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 290, 291—August Term, 1991

(Argued October 7, 1991 Decided January 13, 1992)

Docket Nos. 91-7509, 91-7511

JOHN M. SPEAR; SPEAR PRINTING CO., INC.,
Plaintiffs-Appellants,

—v.—

TOWN OF WEST HARTFORD; MAJORIE S. WILDER, ESQ., Corporation Counsel in her official and individual capacity; ROBERT R. MCCUE, Chief of Police in his official and individual capacity as Chief of Police and acting Town Manager; SUMMIT WOMEN'S CENTER WEST, INC.,
Defendants-Appellees.

Before:

OAKES, *Chief Judge*,
VAN GRAAFEILAND and NEWMAN, *Circuit Judges.*

Newspaper editor and publisher sued town, town officials, and abortion clinic in the United States District Court for the District of Connecticut (Nevas, *J.*) under 42 U.S.C. § 1983 (1988) alleging, among other things, that the institution of a lawsuit by the town and clinic

against the editor and publisher violated the First Amendment. The district court dismissed the complaint for failure to state a claim, holding that the individual defendants were absolutely immune, the complaint failed to allege a non-speculative chilling effect, and the clinic did not act under color of state law.

Affirmed.

GEORGE J. MERCER, Milford, CT (Joseph P. Secola, The Rutherford Institute of Connecticut, of counsel), *for Plaintiff-Appellant John M. Spear.*

(Vincent P. McCarthy, New Milford, CT, *for Plaintiff-Appellant Spear Printing Co., Inc.*)

DAVID THOMAS RYAN, Hartford, CT (Charles D. Gill, Jr., William A. Collier, Robinson & Cole, Scott M. Karsten, Sack, Spector & Barrett, West Hartford, CT, of counsel), *for Defendants-Appellees Town of West Hartford, Majorie S. Wilder, and Robert R. McCue.*

JON L. SCHOENHORN, Hartford, CT (Hurvitz, Hershinson & Schoenhorn, James J. Szerojko, Halloran & Sage, of counsel), *for Defendant-Appellee Summit Women's Center West, Inc.*

(A. Lawrence Washburn, J., New York, NY, *for amicus curiae Legal Center for Defense of Life.*)

OAKES, *Chief Judge*:

John M. Spear and the Spear Printing Company, Inc. (collectively "Spear") appeal from a judgment of the United States District Court for the District of Connecticut, Alan H. Nevas, *Judge*, dismissing their action against the Town of West Hartford, its Corporation Counsel, its acting Town Manager, and Summit Women's Center West ("Summit"). On this appeal, Spear argues

that the individual defendants are not absolutely immune, that his complaint stated a cause of action under 42 U.S.C. § 1983 (1988), and that Summit acted under color of state law. For the reasons set forth below, we affirm.

BACKGROUND

On April 1, 1989, Operation Rescue staged an anti-abortion protest at Summit, a women's health care facility in West Hartford. Catherine Jersey, an employee of the Spear Printing Company, which publishes the weekly *Orange County Post*, participated in the protest. On April 4, 1989, an editorial written by John M. Spear entitled "Northern Rednecks" appeared in the *Orange County Post*, criticizing the West Hartford Police Department's efforts to disband the demonstration.

The West Hartford Town Council passed a resolution in June 1989 authorizing Corporation Counsel Marjorie Wilder to take legal action to prevent such protests in West Hartford. West Hartford brought suit in federal court to prohibit illegal protest activities. The suit, authorized by Wilder and acting Town Manager and Police Chief Robert McCue, named Spear among other defendants, and asserted RICO and nuisance claims alleging that the defendants had conspired to interfere with civil rights. According to Spear's complaint in the present action, publication of the editorial constituted the sole basis of the town's complaint against Spear.[1]

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[1] Paragraph 66 of West Hartford's complaint in its action against Spear stated:

> On or about Tuesday, April 4, 1989, the defendant Spear Printing Co., Inc., through its editor, the defendant John M. Spear, deliberately and maliciously published an incorrect, defamatory account of the April 1, 1989 protest based upon reports given to him by the defendant Catherine A. Jersey, another employee of the defendant Spear Printing Co., Inc., who was one of the protesters arrested by West Hartford police on April 1, 1989 at the Summit Women's Center, in furtherance

Judge Dorsey issued a temporary restraining order in June 1989. It enjoined all the defendants, including Spear, from various protest activities, but explicitly purported not "to infringe upon any rights under the First Amendment which can properly be exercised without infringing upon the rights intended to be protected hereby." [2] Summit intervened in September 1989, also naming Spear as defendant. On December 6, 1989, the town and Summit filed a joint amended complaint, dropping all claims against Spear.

Spear, in turn, sued the town, Wilder, McCue and Summit under 42 U.S.C. § 1983 (1988). Spear alleged that the RICO suit violated his First Amendment rights, causing "fear, mental anguish and worry over any potential legal liability . . . , thereby causing a chilling effect," and that the town and Summit acted in concert to violate Spear's constitutional rights. Defendants moved to dismiss for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). Wilder and McCue sought absolute immunity; the town argued that the complaint failed to state a cause of action under section 1983; and Summit contended that, as a private organization, it was not acting under color of state law. The district court agreed with all of defendants' arguments and accordingly dismissed the complaint. This appeal followed.

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of the efforts of the defendants and others to harass, intimidate and extort a less diligent or softened response from the West Hartford Police Department to future protest activities by the defendants and others at the Summit Women's Center and elsewhere within the Town of West Hartford.

[2] Subsequently, the district court issued a preliminary injunction against the defendants, but the injunction did not order any relief against Spear. *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371 (D. Conn. 1989). The Second Circuit vacated the injunction, holding that the RICO claim was too insubstantial to invoke the district court's subject matter jurisdiction. 915 F.2d 92, 100-04 (2d Cir. 1990).

DISCUSSION

Spear presses three issues on appeal. First, he argues that the individual defendants Wilder and McCue were not absolutely immune from liability. Second, he contends that he stated a valid section 1983 cause of action for violation of his First Amendment and due process rights and for malicious prosecution. Finally, he claims that Summit acted in concert with the town and can therefore be held liable as a state actor. For the reasons set forth below, we reject all of these claims.

1. Wilder and McCue

The district court accorded Wilder and McCue absolute immunity from personal liability under section 1983. We agree. The damage claims against them were based on their authorization of the lawsuit against Spear, Wilder and McCue acted in their official capacities as Corporation Counsel and acting Town Manager, respectively.

Absolute immunity, because it detracts from section 1983's broadly remedial purpose, *see Scheuer v. Rhodes*, 416 U.S. 232, 243 (1974), applies only to a limited class of officials and functions. *Hafer v. Melo*, 112 S. Ct. 358, 363-64 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). It does, however, protect officials from personal liability for the performance of certain discretionary acts. Such immunity extends to prosecutors, *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976); to executive officers initiating administrative proceedings, *Butz v. Economou*, 438 U.S. 478, 515-17 (1978); to government attorneys defending civil suits, *Barrett v. United States*, 798 F.2d 565, 572 (2d Cir. 1986); and to government attorneys who initiate civil suits, *Augustyniak v. Koch*, 588 F. Supp. 793, 797 (S.D.N.Y.), *aff'd*, 794 F.2d 676 (2d Cir. 1984), *cert. denied*, 474 U.S. 840 (1985). Under this line of immunity case law, Wilder and McCue may not be held liable for authorizing the lawsuit against Spear.

The Supreme Court, in extending prosecutorial immunity to the executive branch, explained that

> agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. . . . The discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from dangers arising from that decision was less than complete.

Butz, 438 U.S. at 515. The reasoning of *Butz* applies not only to federal agency officials, but also to local executive officers. *See, e.g., Aitchison v. Raffiani*, 708 F.2d 96, 99 (3d Cir. 1983); *Reed v. Village of Shorewood*, 704 F.2d 943, 951-52 (7th Cir. 1983). Moreover, that reasoning applies to the initiation of civil lawsuits as well as to administrative proceedings. *See, e.g., AGI-Bluff Manor, Inc. v. Reagen*, 713 F. Supp. 1535, 1544-45 (W.D. Mo. 1989). Thus, when a high executive officer of a municipality authorizes a civil lawsuit in pursuit of that municipality's governmental interests, absolute immunity attaches.

Were McCue, who was not only acting Town Manager but also Police Chief, involved in this matter as a complaining witness rather than as an executive officer authorizing suit, he would not receive absolute immunity. *White v. Frank*, 855 F.2d 956, 961 (2d Cir. 1988). The facts, however, suggest that McCue authorized the suit against Spear in his role as acting Town Manager. Spear's complaint targeted McCue's authorization of the suit, alleging that "McCue authorized the filing of the said lawsuit," and pointing out that McCue "was Acting Town Manager at the time that the Complaint was signed."

Spear contends that *Burns v. Reed*, 111 S. Ct. 1934 (1991), forecloses absolute immunity for Wilder and McCue. In *Burns*, the Supreme Court held that prosecutors do not enjoy absolute immunity for giving *legal advice* to police. 111 S. Ct. at 1944-45. The case turned on the distinction between offering advice and initiating litigation, and thus cannot be taken to reject absolute immunity for decisions to institute legal proceedings on behalf of the government. While *Burns* commends a historical focus in determining whether absolute immunity extends to particular official functions, 111 S. Ct. at 1942-43, it does not support Spear's patently implausible argument that absolute immunity cannot extend to the authorization and initiation of civil RICO litigation because, prior to the existence of the RICO statute, no such immunity existed.

2. *Town of West Hartford*

a. First Amendment.

Spear's complaint alleged that by filing the lawsuit on the basis of the editorial and by obtaining an injunction, West Hartford chilled Spear's exercise of First Amendment rights. The district court nevertheless held that Spear failed to state a cause of action under section 1983 for deprivation of First Amendment rights. Relying on *Laird v. Tatum*, 408 U.S. 1 (1972), the district court explained that a "plaintiff must make specific allegations of fact that indicate a deprivation of constitutional rights; allegations which are nothing more than broad, simple and conclusory statements are insufficient."

In *Laird*, plaintiffs challenged an Army Intelligence data-gathering system, claiming that it chilled their First Amendment rights. The Supreme Court held that no justiciable controversy existed, because the plaintiffs' allegations of a chilling effect were based on the "mere existence" of the data-gathering system. 408 U.S. at 10,

15. Spear attempts to distinguish *Laird* from the present case by pointing out that his allegation of a chilling effect comes not from the "mere existence" of a policy, but from the town's direct action in launching a lawsuit and obtaining an injunction against him.

We are not persuaded by Spear's argument. Neither the preliminary injunction nor the temporary restraining order that preceded it chilled Spear's freedom of expression. The preliminary injunction did not apply to Spear. The temporary restraining order was directed to all the defendants in the RICO action, including Spear. That order, however, explicitly avoided infringing on First Amendment rights.

Spear argues further that the very filing of the lawsuit chilled his First Amendment rights. Spear's allegation of a chill, however, was conclusory and speculative. The complaint offered nothing beyond a bare assertion that the lawsuit "caus[ed] a chilling effect upon his First Amendment rights of the press and speech." Spear did not allege that he had declined to write further anti-abortion editorials, nor did he claim that he had toned down his writing on the subject. He did not allege that he had changed even one word of his writing. Given that the temporary restraining order explicitly excluded First Amendment infringement, Spear's naked assertion of a chill does not suffice to defeat a Rule 12(b)(6) motion.

We do not consider this result irreconcilable with our decision in *Davis v. Village Park II Realty Co.*, 578 F.2d 461 (2d Cir. 1978), where we reversed the dismissal of a civil rights action in which a plaintiff alleged a First Amendment chill. The plaintiff in that case alleged that the defendants' attempt to terminate her lease because of her leadership in tenants' association activities "was designed to chill her First Amendment rights and that it in fact had that effect." *Id.* at 453. Observing that "[*Laird*] did not hold that chilling effect is not legally cognizable; rather, it held that the chilling effect alleged

in that case was so remote and speculative that there was no justiciable case or controversy," we held that Davis's allegations sufficed to withstand a motion to dismiss. *Id.* We cannot equate Davis's predicament, in which she was threatened with eviction for her tenants' association activities, with Spear's, in which he was faced with a temporary restraining order that expressly excluded First Amendment infringement. In sum, we cannot conclude from Spear's complaint that the town's lawsuit inhibited him in the exercise of his First Amendment freedoms.

This is not to say we condone the town's action in naming a newspaper editor and publisher as defendants based on an editorial criticizing the town's police department. Our holding follows only from Spear's failure to allege any non-speculative chilling effect, and thus his failure to allege any impairment of his right under the First Amendment.

b. Due Process.

Government conduct may be actionable under section 1983 as a substantive due process violation if it "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952); *see also Baker v. McCollan*, 443 U.S. 137, 147 (1979) (Blackmun, J., concurring). The district court reasonably concluded that West Hartford's actions in meeting with Summit and suing Spear fell short of that standard. The meeting between the attorneys of the town and Summit, contrary to Spear's allegation, did not concern a conspiracy to violate Spear's rights. Rather, the meeting was meant to provide the town with additional facts about the demonstration.

c. Malicious Prosecution.

Spear's section 1983 claim purportedly predicated on malicious prosecution was properly dismissed. As the district court explained, Spear was subject only to civil, not criminal, liability. Therefore, any abuse would have been

malicious abuse of process rather than malicious prosecution. While section 1983 liability may be predicated on a claim for malicious prosecution, *e.g.*, *White v. Frank*, 855 F.2d 956, 961 n.5 (2d Cir. 1988), it may not be predicated on a claim for malicious abuse of process. *E.g.*, *Havas v. Thornton*, 609 F.2d 372, 376 (9th Cir. 1979).

3. Summit

Section 1983 addresses only those injuries caused by state actors or those acting under color of state law, *Rendell-Baker v. Kohn*, 457 U.S. 830, 835 (1982). A private defendant may be held liable only as "a willful participant in joint activity with the States or its agents." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)).

Spear alleged that Summit, a private entity, acted in concert with the town and its agents. That conclusory allegation does not suffice to state a section 1983 action against Summit. *See Zemsky v. City of New York*, 821 F.2d 148, 151-52 (2d Cir.), *cert. denied*, 484 U.S. 965 (1987). To state a claim against a private entity on a section 1983 conspiracy theory, the complaint must allege facts demonstrating that the private entity acted in concert with the state actor to commit an unconstitutional act. "In final analysis the question is whether 'the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State.' " *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 199 (1988) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)); *see also Conway v. Village of Mount Kisco*, 750 F.2d 205, 214 n.12 (2d Cir. 1984) ("[P]rivate litigants engaged in a conspiracy with state officials to violate the Fourteenth Amendment are amenable to a cause of action under § 1983—whether as state actors by virtue of conspiratorial conduct with state officials, or as private actors who, acting in conspiratorial concert with

state actors, thereby act under color of law."), *reaff'd*, 758 F.2d 46 (2d Cir. 1985), *cert. dismissed*, 479 U.S. 84 (1986). The only joint conduct alleged in the present case was a meeting between attorneys for West Hartford and for Summit. When the town and Summit later filed a joint complaint, Spear was not named as a defendant. Summit, in sum, did not act under color of law. Thus, the district court correctly dismissed Spear's claim against Summit.

Accordingly, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Civil No. H-90-682 (AHN)

JOHN M. SPEAR and SPEAR PRINTING COMPANY, INC.

v.

TOWN OF WEST HARTFORD, MARJORIE S. WILDER, Corporation Counsel, and ROBERT R. MCCUE, Chief of Police and Acting Town Manager, in their official and individual capacities, and SUMMIT WOMEN'S CENTER WEST, INC.

RULING ON MOTIONS TO DISMISS

[Filed Apr. 17, 1991]

On August 22, 1990, John Spear ("Spear") and Spear Printing Company, Inc. ("Spear Printing"), commenced this section 1983 action against the Town of West Hartford ("the Town"), Marjorie Wilder ("Wilder"), Corporation Counsel for the Town of West Hartford, Robert McCue ("McCue"), Police Chief and acting Town Manager for the Town of West Hartford, and Summit Women's Center West, Inc. ("Summit").[1] The plaintiffs allege violations of the First and Fourteenth Amendments (Count I), vexatious litigation (Count II), and libel defamation (Count III). The defendants now move to dismiss all counts of the complaint pursuant to Rule 12 (b) (6), Fed. R. Civ. P. For the reasons stated below the defendants' motions to dismiss are granted.

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[1] The complaint was filed in response to the defendants' initiation of a civil action against the plaintiffs in June 1989.

DISCUSSION

When considering a motion to dismiss the court accepts all factual allegations in the complaint as true and draws inferences from these allegations in the light most favorable to the plaintiff. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Corcoran v. American Plan Corp.*, 886 F.2d 16, 17 (2d Cir. 1989). Dismissal is not warranted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Patton v. Dole*, 806 F.2d 24, 30 (2d Cir. 1986). "The issue is not whether a plaintiff's success on the merits is likely but rather whether the claimant is entitled to proceed beyond the threshold in attempting to establish his claims." *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979). Thus, the question for this court to decide is "whether or not it appears to a certainty under existing law that no relief can be granted under any set of facts that might be proved in support of plaintiff's claims." *De La Cruz*, 582 F.2d at 48.

I. BACKGROUND

A. *Town of West Hartford v. Operation Rescue*

Spear is the editor of the *Orange County Post* ("*The Post*"), a weekly newspaper published in Washingtonville, New York. Spear Printing, a corporation owned by Spear and others, publishes *The Post*. On April 4, 1989, Spear wrote and published an editorial entitled "Northern Rednecks" in which he commented upon and sharply criticized the actions of the West Hartford Police Department in attempting to disband an Operation Rescue anti-abortion demonstration in front of the Summit Women's Center in West Hartford, Connecticut. At some point between April 4 and April 20, 1989, a copy of the editorial was given to the Town's corporation counsel. On June 27, 1989, the West Hartford Town Council passed a resolu-

tion authorizing Wilder "to take whatever legal action necessary" to stop future Operation Rescue protests from occurring in the Town. Two days later, the Town, through the office of its corporation counsel, commenced civil action in the United States District Court for the District of Connecticut, to prohibit future demonstrations in the Town.[2] Wilder and McCue authorized the filing of the complaint, in which two of the defendants named were Spear and Spear Printing.[3] The complaint included causes of action pursuant to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.*, and alleged, among other things, a conspiracy to interfere with civil rights.[4] The complaint also sought injunctive relief. United States District Judge Peter C. Dorsey issued a temporary injunction on June 29, 1989 and extended the injunction on July 13, 1989.

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[2] *Town of West Hartford v. Operation Rescue, et al.*, Civil Action H-89-400 (PCD).

[3] The only connection Spear and Spear Printing had to the anti-abortion demonstration was the printing of "Northern Rednecks". The information contained in the editorial was provided to the newspaper by one of its reporters, Catherine A. Jersey, who had participated in the demonstration. There was no indication that Spear and Spear Printing were involved otherwise in the demonstrations that occurred in the Town during April and June of 1989.

[4] Paragraph 66 of the complaint stated:

> On or about Tuesday, April 4, 1989, the defendant Spear Printing Co., Inc., through its editor, the defendant John M. Spear, deliberately and maliciously published an incorrect, defamatory account of the April 1, 1989 protest based upon reports given to him by the defendant Catherine A. Jersey, another employee of the defendant Spear Printing Co., Inc., who was one of the protesters arrested by West Hartford police on April 1, 1989 at the Summit Women's Center, in furtherance of the efforts of the Defendants and others to harass, intimidate and extort a less diligent or softened response from the West Hartford Police Department to future protest activities by the Defendants and others at the Summit Women's Center and elsewhere within the Town of West Hartford.

On September 22, 1989, Summit filed an intervenor complaint, also naming Spear and Spear Printing as defendants.[5] On December 6, 1989, the Town and Summit filed a joint amended complaint. The joint amended complaint dropped the allegations against Spear and Spear Printing and thereby terminated the litigation against them.

B. *The Instant Action*

Here, the plaintiffs make several allegations. First, they contend that the temporary injunction caused an intimidating and chilling effect upon their First Amendment right to freedom of the press. The plaintiffs also allege that between June 17 and 29, 1989, the Town and Summit agreed to act together in commencing litigation against Spear and Spear Printing, and that the joint decision violated their due process rights. The defendants' response is threefold. Wilder and McCue argue that they are absolutely immune from suit because they authorized the filing of the Town's complaint in their official capacities. The Town argues that the complaint fails to state a cause of action under section 1983. And Summit argues that it was not a "state actor acting under color of law" and therefore it is immune from a section 1983 action.

II. COUNT ONE: 42 U.S.C. § 1983

A. *Wilder and McCue*

The plaintiffs allege that Wilder and McCue authorized the filing of the Town's complaint against them.[6] Wilder

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[5] The only allegation regarding Spear and Spear Printing in Summit's complaint is identical to the language in footnote four.

[6] Paragraph 21 of the complaint states:

> On or about June 29, 1989, the Town of West Hartford, through the office of its Corporation Counsel, . . . commenced a legal action in the United States District Court for the District of Connecticut, ... Two of the defendants in the said action

and McCue contend that they are absolutely immune from suit because they initiated proceedings against the plaintiffs in their capacities as government officials. The court agrees with Wilder and McCue.

Absolute immunity is an affirmative defense that serves to protect government officials, when performing discretionary acts, from personal liability under section 1983. *Gomez v. Toledo*, 446 U.S. 635 (1980); *Dobosz v. Walsh*, 892 F.2d 1135, 1140 (2d Cir. 1989). Absolute immunity has been accorded to various categories of government officials in order to enable them to function independently, and without fear or harassment. Government officials that enjoy the protection of absolute immunity include prosecutors, *Imbler v. Pachtman*, 424 U.S. 409 (1976) and high executive officers engaged in quasi-judicial functions, *Butz v. Economou*, 438 U.S. 478 (1978).

In *Imbler*, the Supreme Court held that absolute immunity from section 1983 liability exists for prosecutorial activities "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430; *accord Butz*, 438 U.S. at 510-511. In *Butz*, the Supreme Court analogized government administrative proceedings to criminal prosecution. The Court held that government officials initiating administrative proceedings, and agency attorneys introducing evidence and cross-examining witnesses in them, are absolutely immune from liability in damages for their decisions. *Butz*, 428 U.S. at 512-517. The Court reasoned that were government officials and attorneys subject to liability, they "might hesitate to bring forward some witnesses or documents" for fear that the proof might turn out to be false. *Butz*, 428 U.S. at 517.

The Second Circuit extended absolute immunity to government attorneys who defend civil actions in *Barrett v.*

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were John M. Spear and Spear Printing, Co., Inc. On information and belief, Defendants Wilder and McCue authorized the filing of the said lawsuit.

United States, 798 F.2d 565 (2d Cir. 1986). In *Barrett* the court reasoned that:

> It is urged that [absolute immunity ought not be accorded] when the government attorney *defends* a civil suit. We disagree. It is true that the successful plaintiff in such litigation, having gained some or all of the relief sought, is unlikely to follow up with a harassing suit against the defending government lawyer. Also, the risk to the successful government civil defense attorney of becoming the victim of vexatious litigation by a disappointed litigant is probably less than if the government attorney had initiated the litigation. However, that risk is far from non-existent. His image may not be comparable to that of a prosecutor, but it is not difficult to conceive of situations where, although the government is the defendant, its counsel asserts affirmative defenses . . . . tending to upset or excite resentment on the part of the civil plaintiff. . . . His function as a government advocate therefore entitles him to absolute immunity, which is 'necessary to assure that . . . . *advocates* . . . can perform their respective functions without harassment or intimidation.'

Barrett, 798 F.2d 572 (quoting *Butz*, 438 U.S. at 512) (emphasis supplied). For the same reasons, absolute immunity has also been afforded to municipal attorneys who initiate civil actions.[7]

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[7] *See Martin Hodas, East Coast Cinematics v. Lindsay*, 431 F. Supp. 637, 642-643 (S.D.N.Y. 1977) (in section 1983 action absolute immunity extended to city corporation counsel who initiated civil proceedings against the plaintiff); *Augustyniak v. Koch*, 588 F. Supp. 793, 797-98 (S.D.N.Y. 1984), *aff'd*, 794 F.2d 676 (2d Cir. 1984), *cert. denied*, 474 U.S. 840 (1985) (city attorneys absolutely immune from section 1983 liability arising from their initiation of civil proceedings to enforce municipal housing code); *O'Sullivan v. Saperston*, 587 F. Supp. 1041, 1043 (S.D.N.Y. 1984) (corporation counsel absolutely immune from section 1983 liability arising from his initiation of proceedings to enforce judgment for child support).

Here, plaintiffs allege that Wilder and McCue authorized the filing of the complaint and that McCue verified the facts submitted in the complaint. The plaintiffs also allege that Wilder and McCue initiated the suit pursuant to the Town Council resolution in which Wilder and McCue were directed to take "whatever legal action necessary" to prevent future anti-abortion demonstrations. Clearly, Wilder and McCue acted in their official capacities in response to a directive from the Town Council. Accordingly, Wilder and McCue are absolutely immune, in their official and individual capacities, from section 1983 liability. The court thus dismisses Count I of the complaint as to Wilder and McCue.

B. *The Town*

1. *Deprivation of First Amendment Rights*

The Town contends that plaintiffs fail to state a cause of action under section 1983 for deprivation of their First Amendments rights. In *Laird v. Tatum*, 408 U.S. 1, 12 (1972), the Supreme Court observed that "[g]overnmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights." The Court also noted the importance of:

> [the] established principle that to entitle a private individual to invoke judicial power to determine the validity of executive or legislative action, he must show that he has sustained or is in immediate danger of sustaining, a direct injury as a result of that action.

Laird 408 U.S. at 14 (1972) (citing *Ex parte Levitt*, 302 U.S. 633, 634 (1937)). Thus, the plaintiff must make specific allegations of fact that indicate a deprivation of constitutional rights; allegations which are nothing more than broad, simple and conclusory statements are insufficient. *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987); *Koch v. Yunich*, 533 F.2d 80, 85 (2d

Cir. 1976); *Fine v. City of New York*, 529 F.2d 70, 73 (2d Cir. 1975).[6]

Here, the plaintiffs' claim is that the defendants' authorization and filing of the complaint produced a chilling effect upon the exercise of the plaintiffs' First Amendment rights. Paragraph 29A of the complaint states:

> The general anti-conspiracy language of both injunctions which were authorized by the Town, and which was broadly worded against all Defendants, including the Plaintiffs, caused an intimidating and chilling effect upon the Plaintiffs' First Amendment free press rights, because the only act identified in the Complaint against the Plaintiffs was the editorial.

In paragraph 58 of the complaint, the plaintiffs allege:

> The said lawsuits instituted by the Town of West Hartford and the Summit Women's Center West, Inc. caused John M. Spear fear, mental anguish and worry over any potential legal liability particularly in view of the allegations of criminal acts, criminal extortion and criminal racketeering conspiracy, thereby causing a chilling effect upon his First Amendment rights of the press and speech.

Paragraph 60 of the complaint states:

> The said West Hartford and Summit Complaint brought by the Town of West Hartford and Summit against John M. Spear and Spear Printing Co., Inc. were commenced with malice or reckless indifference to the plaintiff's Constitutional rights and deprived John M. Spear and Spear Printing Company, Inc. of their First Amendment rights of speech and of the press.

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[6] The "mere allegation that [the plaintiff] was harmed does not amount to satisfying the causation requirement of a Section 1983 action." *Sullivan v. Carrick*, 888 F.2d 1, 4 (1st Cir. 1989).

In paragraph 62 of the complaint, the plaintiffs allege:

> The said two lawsuits and the subsequent litigation have damaged John M. Spear and Spear Printing Co., Inc. in that they have been deprived of their rights of speech and of the press by the chilling effect of the said RICO and Hobbs Act lawsuits and particularly by their allegations of extortion, crimes and criminal racketeering conspiracy.

These allegations are insufficient. The plaintiffs fail to make specific allegations that indicate a deprivation of constitutional rights. Indeed, there is no indication that the plaintiffs did in fact suffer any cognizable constitutional deprivation; the plaintiffs have not alleged that Spear stopped writing editorials or that Spear Printing stopped publication during the time they were parties to the lawsuit. As the Supreme Court held in *Laird*, "allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird*, 408 U.S. at 14-15.[9] The chilling effect alleged by the plaintiffs is speculative, indirect and remote. Accordingly, the plaintiffs have failed to allege a cause of action pursuant to section 1983 for deprivation of their First Amendment rights.

2. *Substantive Due Process*

The plaintiffs have also failed to state a claim under section 1983 based on a violation of substantive due process. Pursuant to section 1983, the plaintiff need not allege a violation of a specific constitutional guarantee. *Baker v. McCollan*, 443 U.S. 137, 147 (1979). However, section 1983 does require that the actions alleged "shock the conscience," offend the "concept of ordered liberty," or suggest "outrageousness." *Baker*, 443 U.S. at 147

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[9] *See also Sullivan*, 888 F.2d at 3 ("to show a First Amendment violation in this context [the plaintiff] must allege that his speech was in fact chilled or intimidated"); *Collin County, Texas v. H.A.V.E.N.*, 654 F. Supp. 943, 953 (N.D. Tex. 1987); *Laxalt v. McClatchy*, 622 F. Supp. 737 (D. Nev. 1985).

(Blackmun, J., concurring). Unless the alleged conduct is so egregious that it violates "a principle of justice so rooted in the conditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97 (1934), it does not violate substantive due process and thus will not support a claim cognizable under section 1983. *Baker*, 443 U.S. at 146-47.

Here, the court holds that the defendants' initiation of suit against the plaintiffs and the meeting between the Town's attorneys, the attorneys for Summit and Leisa Montgomery, a Summit administrator, do not constitute conduct so egregious as to "shock the conscience." [10]

3. *Malicious Prosecution*

In paragraphs 37, 38 and 60 of the complaint, the plaintiffs allege that the defendants' "frivolous, vexatious lawsuit" constituted an "improper misuse of the [c]ivil legal procedure." Specifically, the plaintiffs assert that allegations of malicious prosecution support a cause of action pursuant to section 1983. The defendants contend that the allegations do not set forth a cause of action pursuant to section 1983 and that the proper avenue for relief is a state court action. The court holds that the plaintiffs' complaint does not state a cause of action for malicious and vexatious prosecution under section 1983.

The plaintiffs confuse two distinct causes of action. They assert that the complaint adequately supports a cause of action for malicious prosecution under section 1983, yet they were subject to *civil* liability by the suit initiated by the defendants. Malicious prosecution is dis-

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[10] The plaintiffs contend that the meeting between corporation counsel, Summit's counsel and a Summit administrator provided the defendants with an opportunity to conspire to violate the plaintiffs' constitutional rights. However, it is reasonable to conclude the meeting was scheduled to provide the Town with an opportunity to learn additional facts concerning the April 1, 1989, demonstration.

tinguished from malicious abuse of process "in that the former relates only to criminal actions while the latter applies only to civil actions." 54 *Corpus Juris Secundum*, Malicious Prosecution § 3, at 524. Indeed, the plaintiffs cite no authority for the proposition that the malicious abuse of process supports a claim under 1983.[11] In contrast, the Town adequately supports its motion to dismiss with germane case law which embodies the proposition that section 1983 liability may not be predicated on a claim for malicious abuse of process. *See Coogan v. City of Wixom*, 820 F.2d 170, 174-5 (6th Cir. 1987); *Havas v. Thornton*, 609 F.2d 372, 376 (9th Cir. 1979); *Becker Phosphate Corp. v. Muirhead*, 581 F.2d 1187, 1189 (5th Cir. 1978); *AGI-Bluff Manor, Inc. v. Reagen*, 713 F. Supp. 1535, 1544 (W.D.Mo. 1989); *Philips v. Pennsylvania Higher Educ. Assistance Agency*, 479 F. Supp. 712, 722 (W.D. Pa. 1980), *cert. denied*, 455 U.S. 924 (1981), *rev'd on other grounds*, 657 F.2d 554 (5th Cir. 1981). Accordingly, the court holds that the complaint does not state a cause of action for malicious prosecution under section 1983.

C. *Summit*

The plaintiffs also allege that Summit conspired with the Town to violate their constitutional rights.[12] Sum-

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[11] The cases cited by the plaintiffs uniformly concern the imposition of liability under section 1983 based on malicious *criminal* prosecution. *See e.g., White v. Frank*, 855 F.2d 956, 961 n.5 (2d Cir. 1988); *Conway v. Village of Mount Kisko*, 758 F.2d 46, 48 (2d Cir. 1985), *cert. dismissed*, 479 U.S. 84 (1986); *Raysor v. Port Authority of New York and New Jersey*, 768 F.2d 34, 39-40 (2d Cir. 1984), *cert. denied*, 475 U.S. 1027 (1986); and *Singleton v. New York*, 632 F.2d 185 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981).

[12] Paragraph 46 of the plaintiffs' complaint alleges that:

> Between June 17, 1990, and the filing date of June 29, 1990, an agreement was reached to act in concert between Defendant Summit Women's Center West, Inc., and the Defendant Town of West Hartford and its agents. A meeting took place between attorneys from the Corporation Counsel's office, attorneys

mit argues that it is a private entity with no authority to act under color of law and thus is not subject to liability pursuant to section 1983. The court agrees with Summit.

Section 1983 does not provide a remedy for all constitutional injuries, but only for those caused by persons who either are state actors or are acting "under color of state law." *Rendell-Baker v. Kohn*, 457 U.S. 830, 835 (1982); *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 156 (1978); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). The Supreme Court defines "acting under color of state law" as the "'[m]isuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Monroe v. Pape*, 365 U.S. 167, 184 (1961) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). Of course, in order to act under color of state law the defendant need not be an officer of the state. Private parties may incur liability for their conduct when the individual actor is "a willful participant in joint activity with the State or its agents." *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 152 (quoting *United States v. Price*, 383 U.S. 787, 794 (1966)).

In paragraphs 46 and 47 of the complaint, the plaintiffs allege that (i) "[a]n agreement was reached to act in concert between defendant Summit Women's Center West, Inc., and the defendant Town of West Hartford and its agents"; and (ii) "such a joint decision to commence wrongful civil proceedings" violated the plaintiffs' due process rights.

These allegations are insufficient for three reasons. First, the allegations are conclusory and too vague to support a claim of conspiracy between a private party

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for Summit Women's Center West, Inc. and Summit Administrator Leisa Montgomery, where a joint decision was reached to commence litigation against John M. Spear and Spear Printing Company, Inc.

and a government actor for purposes of the "action under the color of law" requirement. *See Zemsky v. City of New York*, 821 F.2d 148, 152 (2d Cir.), *cert. denied*, 484 U.S. 965 (1987) (conspiracy claims dismissed because they were "so vague and unsupported by description of particular overt acts"); *McGillicuddy v. Clemens*, 746 F.2d 76, 77 (1st Cir. 1984) ("the relationship or nature of cooperation between the state and a private individual must be plead *in some detail*") (emphasis in original).

Second, conspiracy claims are not actionable under section 1983 unless the conspiracy is designed to violate the plaintiffs' constitutional rights. *Farrar v. Cain*, 756 F.2d 1148 (5th Cir. 1985). Here the complaint merely alleges that an agreement was reached between the Town and Summit to "commence litigation" against the plaintiffs. *Complaint* ¶¶ 46-7. Without more specific factual allegations, the agreement to "commence litigation" does not constitute a constitutional violation." [13]

Third, the complaint does not adequately allege facts that transform Summit, a private party, into a state actor. The only joint activity alleged between Summit and the Town is a meeting between attorneys from the corporation counsel's office, attorneys for Summit, and a Summit administrator. Later, the Town and Summit filed a joint complaint, but the plaintiffs were not named as parties. Thus the court finds there was no "willful participa[tion] in joint activity with the State or its agents," *Adickes*, 398 U.S. at 152. Accordingly, Summit's motion to dismiss Count I of the complaint is granted.

III. PENDENT STATE CLAIMS: COUNTS II AND III

The plaintiffs' remaining claims are grounded in state law. Jurisdiction over these claims is premised upon

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[13] It bears noting that Summit was not a plaintiff at the time the Town brought its suit against Spear and Spear Printing. This substantially undermines any claims of conspiracy between Summit and the Town.

the doctrine of pendent jurisdiction. In this ruling the court dismisses the anchor claims and thus the pendent state claims must also be dismissed. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ("certainly, if the federal claims are dismissed before trial . . . the state claims should be dismissed as well"); *Albany Insurance Co. v. Esses*, 831 F.2d 41, 45 (2d Cir. 1987) ("[s]ince the only subject matter jurisdictional basis for this lawsuit . . . was properly dismissed, it was well within the discretion of the district court to dismiss the pendent state law claims"). Furthermore, absent unusual circumstances, the court would abuse its discretion were it to retain jurisdiction of the pendent state law claims on the basis of a federal question claim already disposed of pursuant to a Rule 12 (b) (6) motion. *See Nolan v. Meyer*, 520 F.2d 1276, 1280 (2d Cir.) *cert. denied*, 423 U.S. 1034 (1975); *Smith v. Weinstein*, 578 F. Supp. 1297, 1304 (S.D.N.Y.), *aff'd*, 738 F.2d 419 (2d Cir. 1984). Accordingly, Counts II and III of the complaint are also dismissed as to all defendants.

CONCLUSION

Thus, the complaint is dismissed. It is dismissed as to Wilder and McCue on the basis of absolute immunity. It is dismissed as to the Town on the ground that the plaintiffs fail to state a cause of action under section 1983. And it is dismissed as to Summit for the plaintiffs' failure to allege with specificity the conspiracy between Summit and the Town. Finally, the causes of action alleging violations of state law are dismissed for lack of jurisdiction.

SO ORDERED this 16 day of April, 1991, at Hartford, Connecticut.

/s/ Alan H. Nevas
ALAN H. NEVAS
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tweny-first day of February one thousand nine hundred and ninety-two.

Docket Number: 91-7509/91-7511

JOHN M. SPEAR; SPEAR PRINTING CO., INC.,
Plaintiffs-Appellants,

v.

TOWN OF WEST HARTFORD; MARJORIE S. WILDER, ESQ., Corporation Counsel in her official and individual capacity; ROBERT R. MCCUE, Chief of Police in his official and individual capacity as Chief of Police and acting Town Manager; SUMMIT WOMEN'S CENTER WEST, INC.,
Defendants-Appellees.

[Filed Feb. 21, 1992]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plaintiffs-Appellants, John M. Spear; Spear Printing Company Incorporated.

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

H 90 682

JOHN M. SPEAR and SPEAR PRINTING COMPANY, INC.

vs.

TOWN OF WEST HARTFORD, MARJORIE S. WILDER, Corporation Counsel in her official and individual capacity, ROBERT R. MCCUE, Chief of Police in his official and individual capacity as Chief of Police and Acting Town Manager and SUMMIT WOMEN'S CENTER WEST, INC.

COMPLAINT

[Filed Aug. 22, 1990]

FIRST COUNT

1. This is a case asserting John M. Spear and Spear Printing Company, Inc.'s fundamental Constitutional rights of the freedoms of the press and speech and the due process of law involving publishing editorials commenting on critical issues of public concern. The controversy is over the initiation by Defendants of unconstitutional malicious, egregious and baseless wrongful civil proceedings under RICO (Racketeering Influenced Corrupt Organizations Act, 18 U.S.C. Section 1961, et seq.) and the Hobbs Act (Federal criminal extortion, 18 U.S.C. Section 1951) and various state claims, with the intent to intimidate, harass, censor and silence a free press which is critical of the government and deter John M. Spear and Spear Printing Company, Inc. from the

exercise of their First Amendment free press and speech rights and to attempt to use the court system to obtain a prior restraint against the free press rights of John M. Spear and Spear Printing Company, Inc. The sole factual basis against John M. Spear and Spear Printing Company, Inc. was the publishing of an editorial April 4, 1989, which was critical of West Hartford police action against anti-abortion protestors on or about April 1, 1989.

2. John M. Spear and Spear Printing Company, Inc. bring this action to redress violations by the Defendant Town of West Hartford, its agents and Summit Women's Center West, Inc., acting in concert, of their rights under the Constitution and laws of the United States and the State of Connecticut.

3. John M. Spear and Spear Printing Company, Inc. bring this action to redress the deprivation under color of statute, ordinance, regulation, customs and usage of the right, privilege and immunity secured by the First and Fourteenth Amendments to the Constitution of the United States (42 U.S.C. Section 1983), and arising under the laws and statutes of the State of Connecticut.

4. The jurisdiction of this Court is invoked under 28 U.S.C. Section 2201 and 2202 and 28 U.S.C. Section 1331 and 1343 (3) and the First and Fourteenth Amendments to the Constitution of the United States. This action arises under the Constitution and laws of the United States, including the Civil Rights Act of 1871 and 42 U.S.C. Section 1983. The Plaintiffs' claims arose in this judicial district.

PARTIES

5. The Plaintiff John Spear is the editor of the *Orange County Post*, a weekly newspaper published in Washingtonville, New York. Mr. Spear is a resident of Washingtonville, New York.

6. The Plaintiff Spear Printing Company, Inc. is a corporation owned by John M. Spear and others, which publishes the *Orange County Post*.

7. The Town of West Hartford is a municipality under the laws of the State of Connecticut.

8. Marjorie S. Wilder is the Corporation Counsel for the Town of West Hartford, and at all times was an agent and employee of the Town acting within the scope of her employment. Defendant Wilder was acting under the color of her official capacity and her acts were performed under the color of the statutes and ordinances and other official decisions of the Town of West Hartford of the State of Connecticut. All allegations involving Defendant Wilder are averred both in her official capacity and as an individual.

9. Robert R. McCue is the Chief of Police for the Town of West Hartford and was Acting Town Manager at the time that the Complaint was signed; in fact, Defendant McCue signed the Complaint, verifying the facts within it, including the claims against the Plaintiffs, and at all times he was an agent and employee of the Town acting within the scope of his employment. Defendant McCue was acting under the color of his official capacity and his acts were performed under the color of the statutes and ordinances and other official decisions of the Town of West Hartford of the State of Connecticut. All allegations involving McCue are averred both in his official capacity and as an individual.

10. The term "the Town and its agents" will be used throughout this Complaint to indicate the following persons or legal entities: the Town of West Hartford, Defendant Wilder, Defendant McCue, non-Defendant Patrick G. Alair, the Assistant Corporation Counsel of the Defendant Town or other agents or employees of the Defendant Town of West Hartford which are presently unknown to the Plaintiffs. All such allegations are made

against individuals in both their official and individual capacities.

11. Summit Women's Center West, Inc. is a corporation created and existing under the laws of the State of Connecticut.

12. During all times mentioned herein, the Defendants, each of them, separately and in concert, acted under color and pretense of law, to wit under color of the statutes, ordinances, regulations, customs and usages of the State of Connecticut and the County of Hartford in the Town of West Hartford. Each of the Defendants here, separately and in concert, engaged in the illegal conduct herein mentioned in the injury of John M. Spear and Spear Printing Company, Inc. and deprived the Plaintiffs of the rights, privileges and immunity secured to the Plaintiffs by the First and Fourteenth Amendments to the Constitution of the United States and the Laws of the United States and the State of Connecticut.

13. Defendant Town of West Hartford authorized the actions and activities of Defendants McCue and Wilder and other agents by municipal policy, regulation, and officially adopted and promulgated decision. Specifically the Town of West Hartford authorized the actions and policies of Defendants McCue and Wilder and other agents at a duly constituted meeting of the Town Council on June 27, 1989, was in full consultation and participation with their decisions, and in fact Chief Robert McCue was the Acting Town Manager at the time of the filing of the West Hartford Complaint. The activities by the Town of West Hartford and its agents acting in concert with the Defendant Summit Women's Center West, Inc. deprived John M. Spear and Spear Printing Company, Inc. of their rights, privileges and immunity secured to the Plaintiffs by the First and Fourteenth Amendments to the United States Constitution and to the Laws of the United States and State of Connecticut.

STATEMENT OF FACTS

14. On April 4, 1989, John M. Spear, acting as Editor, published an editorial entitled "Northern Rednecks", where he commented on the West Hartford police response to an anti-abortion protest which took place in the Town of West Hartford on April 1, 1989. The editorial is attached as Exhibit A.

15. The editorial was published on April 4, 1989 in the *Orange County Post*, which is published by Spear Printing Company, Inc.

16. Between the time of April 4 and April 20, 1990, Chief of Police Robert R. McCue obtained a copy of the Spear editorial and gave it to the Corporation counsel's office and on information and belief requested action against John M. Spear and Spear Printing Company, Inc.

17. On or about April 20, 1989, Patrick G. Alair, the Assistant Corporation Counsel of the Town of West Hartford, wrote Plaintiff John M. Spear a letter attaching a copy of the editorial and inquiring whether or not the editorial was a news report, an editorial or a letter to the edtior, and he also requested the identity of the author. Patrick G. Alair, at all relevant times, was under the supervision and control of Defendant Wilder and acted with her approval and the approval of the Defendant Town.

18. On or about May 4, 1989, John M. Spear, as editor of the *Orange County Post*, wrote back to Mr. Patrick G. Alair of the Town of West Hartford, stating that the editorial expressed his opinions as an editor, which editorial was written after speaking with two individuals who were present at the protest.

19. On or about June 7, 1989, John M. Spear received a letter from Patrick G. Alair remitting the amount of One Dollar, including postage and handling, for a copy

of the April 4, 1989 *Orange County Post*. John M. Spear sent him a copy of the said paper.

20. On or about June 27, 1989, a meeting of the Town Council of the Town of West Hartford was held, and during that meeting a resolution was passed by the Town Council authorizing the Corporation Counsel, Marjorie S. Wilder, who was present at the meeting, to take whatever legal action was necessary to stop any more protests from occurring in the Town of West Hartford.

21. On or about June 29, 1989, the Town of West Hartford, through the office of its Corporation Counsel, Patrick G. Alair in particular, commenced a legal action in the United States District Court for the District of Connecticut, entitled *Town of West Hartford vs. Operation Rescue*, et al., Civil Action H-89-400 (PCD). Two of the Defendants in the said action were John M. Spear and the Spear Printing Company, Inc. On information and belief, Defendants Wilder and McCue authorized the filing of the said lawsuit.

22. John M. Spear and Spear Printing Company, Inc. were forced to obtain legal counsel to defend themselves in the RICO and Hobbs complaint brought by the Town of West Hartford.

23. The Plaintiffs were accused of violating and conspiring to violate West Hartford's legal rights under the following legal theories:

Count I: RICO, based upon the editorial being the crime of extortion under the Hobbs Act;

Count II: Conspiracy;

Count III: Conspiracy to interfere with Civil Rights (Federal);

Count IV: Conspiracy to interfere with Civil Rights (State);

Count V: Negligence;

Count VI: Public Nuisance;

Count VII: Declaratory Judgement;

Count VIII: Injuncture Relief.

No legal theories of defamation or libel were alleged against John M. Spear and Spear Printing Company, Inc. by the Defendants.

23. In the West Hartford Complaint, the Town of West Hartford alleged without factual or legal basis that John M. Spear and Spear Printing Company, Inc. were RICO criminal conspirators engaging in acts of criminal extortion which met the requirements of an indictment under the Titles 18 U.S.C. Section 1951, the Hobbs Act and 18 U.S.C. 1961 et seq., the RICO Act.

24. In the West Hartford Complaint, at Paragraph 11 it states: "Spear Printing Co., Inc. publishes the *Orange County Post*, a weekly newspaper, at 15 Goshen Avenue, Washingtonville, NY, and employs the Defendants John M. Spear and Catherine A. Jersey."

25. At Paragraph 12 of the West Hartford Complaint it states: "John M. Spear is the Editor of the *Orange County Post*, and has actively supported the illegal activities of Operation Rescue *through that medium.*" (Emphasis added.)

26. At Paragraph 66 of the said West Hartford Complaint it states: "On or about Tuesday, April 4, 1989, the Defendant Spear Printing Co., Inc., through its editor, the Defendant John M. Spear, deliberately and maliciously published an incorrect, defamatory account of the April 1, 1989 protest based upon reports given to him by the Defendant Catherine A. Jersey, another employee of the Defendant Spear Printing Co., Inc., who was one of the protesters arrested by West Hartford police on April 1, 1989 at the Summit Women's Center, in furtherance of the efforts of the Defendants and others to harass, intimidate and extort a less diligent or softened response from

the West Hartford Police Department to future protest activities by the Defendants and others at the Summit Women's Center and elsewhere within the Town of West Hartford."

27. The West Hartford Complaint sought injunctive relief and damages jointly and severally as well as attorney's fees against all Defendants, including John M. Spear and Spear Printing Company, Inc., although John M. Spear and Spear Printing Company, Inc. did not participate in the protest in any way; their sole act was the editorial.

28. On or about June 29, 1989 an *ex parte* injunction generally prohibiting conspiratorial activities against all the Defendants, including John M. Spear and Spear Printing Company, Inc. was obtained from the United States District Court.

29. On or about July 13, 1989 an extension of the temporary restraining order was obtained from the Court after an uncontested hearing, where no Defendants appeared, against all the Defendants generally including John M. Spear and Spear Printing Company, Inc. When the suit was filed by the Town of West Hartford and its agents, the Town and its agents were fully aware that the only act John M. Spear had committed was to be editor of the *Orange County Post* and to author and publish the said editorial on April 4, 1989.

29A. The general anti-conspiracy language of both injunctions which were authorized by the Town, and which was broadly worded against all Defendants, including the Plaintiffs, caused an intimidating and chilling effect upon the Plaintiffs' First Amendment free press rights, because the only act identified in the Complaint against the Plaintiffs was the editorial.

30. On or about the time the lawsuit was commenced, the only information that the Town had against Plaintiff Spear Printing Company, Inc. was that Spear Printing

Company, Inc. was the publisher of the *Orange County Post* and the said editorial.

31. Although the Town had no information linking John M. Spear and Spear Printing Company, Inc. to the demonstrations which occurred in April of 1989 and June of 1989 in the Town of West Hartford at the Summit Women's Center, the West Hartford Complaint nevertheless included the Plaintiffs in its general allegations of RICO criminal activity and conspiracy.

32. At the time the West Hartford Complaint was filed, the Town and its agents knew in fact that John M. Spear and Spear Printing Company, Inc. were exercising their First Amendment rights to the freedom of the press and speech by publishing an editorial criticizing the West Hartford Police Department for alleged police brutality, an issue of public concern.

33. The Town and its agents were aware that the rights of press and the speech are enshrined in the First Amendment and that it was clearly established and settled First Amendment law that a person in this country cannot be enjoined and punished on the sole basis that publishing an editorial is a federal extortion and racketeering crime. The Defendants acted with malice or reckless indifference to John M. Spear and Spear Printing Company, Inc.'s clearly established constitutional rights.

34. The lawsuit did not allege a defamation or slander count against John M. Spear and Spear Printing Company, Inc., but rather alleged that they participated in a criminal racketeering conspiracy in violation of the Hobbs Extortion Act and the RICO Acts.

35. The Town and its agents knew this lawsuit was completely frivolous and there was absolutely no legal basis to bring a suit against John M. Spear and Spear Printing Company, Inc.

36. The Town and its agents were fully aware that the rights of speech and press of John M. Spear and Spear

Printing Company, Inc. to publish and author editorials was a clearly protected right in the confines of the First Amendment of the United States Constitution.

37. The Town and its agents willfully and maliciously violated the said rights of John M. Spear Printing Company, Inc. by bringing a frivolous, vexatious lawsuit under RICO and Hobbs and various state law claims.

38. The Town and its agents brought the said lawsuit against John M. Spear and Spear Printing Company, Inc. with actual malice and/or reckless indifference of their rights, regarding John M. Spear's and Spear Printing Company, Inc.'s activities, in that their only connection with the said demonstrations was an editorial published after the demonstrations occurred in West Hartford.

39. On or about July 5, 1989 the United States District Court for the District of Connecticut issued an order to the Town of West Hartford entitled, "RICO Case Order, 18 U.S.C., Sections 1961-1968". The said pleading states "the Plaintiff shall file within 20 days hereof, a RICO case statement. This statement shall include the facts the Plaintiff is relying upon to initiate this RICO complaint as a result of the "reasonable inquiry" required by Federal R. Civ. P. 11".

40. Question 2 of the said *RICO Case Order* states: "List each Defendant and state the alleged misconduct and the basis of liability of each Defendant." The Town's answer regarding John M. Spear was as follows: "John M. Spear is the editor of *The Orange County Post*, a newspaper published by the Spear Printing Co., Inc. and has written editorials in support of and encouraging the illegal activities organized by Operation Rescue at which Catherine A. Jersey, another employee of the Spear Printing Co., Inc. has been an active participant."

41. The answer for the Spear Printing Co. is as follows: "Spear Printing Co., Inc. is the employer of Catherine A. Jersey and John M. Spear and is the pub-

lisher of *The Orange County Post*, a weekly newspaper at 15 Goshen Avenue, Washingtonville, New York, which has actively encouraged participation in Operation Rescue-conducted activities.

42. On Question 5A of the said *RICO Case Order* it states: "List the alleged predicate acts and the specific statutes which were allegedly violated." In the Town's RICO case statement, they state: "The predicate acts upon which the plaintiff's RICO claim are based consist primarily of incidents of extortion in violation of 18 U.S.C. Section 1951(a), commonly known as the Hobbs Act."

43. On Question 6D of the said *RICO Case Order* it states: "State whether any Defendants are associated with the alleged enterprise." The Town's answer in their RICO case statement is, "all Defendants are associated with the alleged enterprise to varying degrees."

44. The answer to Question E regarding membership in the enterprise, the Town states: "All the Defendants are members of the enterprise to varying degrees."

45. In a subsequent deposition on December 1, 1989, in the said RICO action, Chief of Police McCue, who was also the acting Town Manager who signed the verified June 29, 1989, complaint of the Town of West Hartford, admitted that the Town in fact had no facts against John M. Spear and Spear Printing Co., Inc. other than the fact that John M. Spear authored and Spear Printing Co., Inc. published an editorial criticizing West Hartford Police action.

46. Between June 17, 1990, and the filing date of June 29, 1990, an agreement was reached to act in concert between Defendant Summit Women's Center West, Inc. and the Defendant Town of West Hartford and its agents. A meeting took place between attorneys from the Corporation Counsel's office, attorneys for Summit Women's Center West, Inc. and Summit Administrator Leisa Mont-

gomery, where a joint decision was reached to commence litigation against John M. Spear and Spear Printing Company, Inc.

47. Such a joint decision to commence wrongful civil proceedings against John M. Spear and Spear Printing Company, Inc. by the Defendants was so egregious that it shocks the conscience in violation of John M. Spear and Spear Printing Company, Inc. rights to the due process of law. The Defendants acted in concert with malice or reckless indifference to John M. Spear and Spear Printing Company, Inc.'s clearly established constitutional rights.

48. All of the foregoing information and allegations were known to Summit Women's Center West, Inc., before it filed a Motion for Intervention as a Plaintiff in the said RICO litigation on July 24, 1989.

49. Subsequently, on September 22, 1989, the Summit Women's Center West, Inc. commenced a mirror RICO and Hobbs Act Complaint as an intervenor which again sued John M. Spear and Spear Printing Co., Inc.

50. In Paragraph 20 of the said Summit complaint, it states in Paragraph 20: "Spear Printing Co., Inc. Washingtonville, New York, and employs the Defendants John M. Spear and Catherine A. Jersey".

51. In Paragraph 21 it states: "John M. Spear is the Editor of the *Orange County Post*, and has actively supported the illegal activities of Operation Rescue" *through that medium*". (emphasis added)

52. The only allegation regarding John M. Spear and Spear Printing Co., Inc. contained in the Summit complaint is found at Paragraph 89 which mirrors the June 29, 1990 West Hartford Complaint: "On or about Tuesday, April 4, 1989, the Defendant, Spear Printing Co., Inc. through its editor, the Defendant Spear, deliberately and maliciously published an incorrect defamatory account

of the April 1, 1989 protest based upon reports given to him by the Defendant Jersey, another employee of the Defendant Spear Printing Co., Inc., who was one of the protestors arrested by West Hartford police on April 1, 1989 at Plaintiff Summit, in furtherance of the efforts of the Defendants and others to harass, intimidate and extort a less diligent or softened response from the West Hartford Police Department to future protest activities by the Defendants and others at Summit and elsewhere within the Town of West Hartford."

53. Summit also accused John M. Spear and Spear Printing Company of various pendant state law claims, in which John M. Spear and Spear Printing Co. were alleged to be co-conspirators, which allegations mirrored the West Hartford's June 29, 1990 Complaint as discussed in paragraph 23 of this Complaint.

54. The Summit Women's Center and its agents were fully aware that the Plaintiff John M. Spear and Spear Printing Co., Inc.'s only connection with the alleged conspiracy was the publication of an editorial.

55. Summit Women's Center West, Inc. had no other information linking the Plaintiffs John M. Spear and Spear Printing Co., Inc. in any way to the alleged demonstration activities other than the authoring and publishing of the said editorial.

56. John M. Spear and Spear Printing Co., Inc. were forced to retain counsel because of the said actions of the Town of West Hartford and its agents and Summit Women's Center West, Inc. and have become obligated for legal fees and costs for their defense in the two said actions.

57. On December 6, 1989, subsequent to Chief McCue's deposition, a joint second amended complaint of the Town of West Hartford and the Summit Women's Center West, Inc. was filed which dropped John M. Spear and Spear

Printing Co., Inc. from the complaint, thereby terminating the litigation in their favor.

58. The said lawsuits instituted by the Town of West Hartford and the Summit Women's Center West, Inc. caused John M. Spear fear, mental anguish and worry over any potential legal liability particularly in view of the allegations of criminal acts, criminal extortion and criminal racketeering conspiracy, thereby causing a chilling effect upon his First Amendment rights of the press and speech.

59. The said action of the Defendants are so egregious in nature that they shock the conscience, depriving John M. Spear and Spear Printing Company, Inc. of their rights to the due process of law under the Fourteenth Amendment of the United States Constitution.

60. The said West Hartford and Summit Complaints brought by the Town of West Hartford and Summit against John M. Spear and Spear Printing Co., Inc. were commenced with malice or reckless indifference to the plaintiff's Constitutional rights and deprived John M. Spear and Spear Printing Company, Inc. of their First Amendment rights of speech and of the press.

61. Those rights of the speech and of the press were clearly established at the time the Town of West Hartford and its agents and Summit made the decision to commence litigation against John M. Spear and Spear Printing Co., Inc. with full knowledge that the only act connecting either Plaintiff with the said demonstration activities was publishing of an editorial on April 4, 1989.

62. The said two lawsuits and the subsequent litigation have damaged John M. Spear and Spear Printing Co., Inc. in that they have been deprived of their rights of speech and of the press by the chilling effect of the said RICO and Hobbs Act lawsuits and particularly by their allegations of extortion, crimes and criminal racketeering conspiracy.

63. It was not objectively reasonable for the Town and its agents and Summit to believe that the commencement and prosecution of their RICO litigation against the Plaintiffs would not violate their First Amendment Rights of press and speech.

64. The said filing of the lawsuits by the Town of West Hartford and its agents and Summit constituted a gross egregious and improper misuse of the Civil legal procedure and was not protected in any way by the rights of the Defendants to seek judicial relief in the courts.

65. The Plaintiffs seek a declaratory judgment pursuant to the Declaratory Judgment Act 28 U.S.C. Section 2202, declaring the rights of the parties hereto.

66. The Plaintiffs allege that granting the Requested Declaratory Judgment will serve a useful purpose in clarifying and settling the legal relations and issues and will terminate the uncertainty, insecurity and controversy giving rise to this action and will eliminate the threat to the Plaintiffs and their fear.

67. There is no adequate state remedy available to the Plaintiffs.

68. Plaintiffs are entitled to their reasonable attorneys fees and costs guaranteed by 42 U.S.C. Section 1988 for violation of the Constitutional rights by the Defendants' actions, decisions and policy.

SECOND COUNT:

1. The preceding paragraphs are incorporated by reference as if fully set forth herein.

69. The said RICO lawsuits of the Town and its agents of June 29, 1989 and Summit Women's Center West, Inc. of September 22, 1989 were brought without probable cause against John M. Spear and Spear Printing Co., Inc. and with malicious intent to vex and harass John M. Spear and Spear Printing Co., Inc.

70. By the filing of the joint Second Amendment complaint dated December 6, 1989, which dropped John M. Spear and Spear Printing Co., Inc. from the complaint, the said legal proceeding terminated in the favor of John M. Spear and Spear Printing Co., Inc.

71. John M. Spear and Spear Printing Co., Inc. have become obligated for legal fees as a result of the vexatious actions of the Defendant Town of West Hartford and its agents and Summit Women's Center West, Inc.

72. The Plaintiffs seek double or treble damages, pursuant to the statute, *Conn. Gen. Stat.* 52-568(a) against all Defendants.

THIRD COUNT

1. The preceding paragraphs are incorporated by reference as if fully set forth herein.

73. The filing of the said RICO and Hobbs Act lawsuits, alleging without any factual basis or truth, criminal activity and conspiracy by the Plaintiffs, the Defendants thereby published libelous and defamatory claims, damaging the Plaintiffs' professional, business and personal reputations.

74. Said publication was false and malicious.

WHEREFORE, the Plaintiffs pray that

1. The Court declare the rights of the parties hereto and declare the actions of the Town and its agents in bringing the said July 29, 1989 lawsuit and Summit, by acting in concert with the Town and in bringing the September 22, 1989, lawsuit to be a deprivation of the Constitutional rights of the Plaintiffs.

2. That the Plaintiffs be awarded their costs and reasonable attorneys fees pursuant to 42 U.S.C. Section 1988.

3. That the Court award double or treble damages pursuant to the Vexatious Suits statute *Conn. Gen. Stat.* 52-568(a) and attorneys fees.

4. That the Court award compensatory damages and punitive damages.

5. That the Court grant further relief whether by law or by equity as it deems just and proper.

THE PLAINTIFFS
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APPENDIX E

Exhibit A to the Complaint

NORTHERN RED NECKS

There was a rescue in West Hartford, Connecticut over the weekend that may become famous in history. It was a day when all the civil rights of those arrested were suspended, when torture, physical injury and abuse were the norm of the day—and some of it was done right in a court room in front of a judge who apparently approved of what was done.

Of course, we have to realize that those arrested are very, very dangerous and their aim is radical—after all, they are trying by non-violent means to keep unborn children from being killed. And since unborn children have no rights at all, it is only logical that those who are trying to protect the most innocent and helpless of the citizens of the United States will have no rights either. Others, while being arrested, even had the audacity to pray—and were subjected to further abuse and torture when they did so. A terrible crime, praying to God.

That was the case over the weekend. Murderers, drug pushers, others of their ilk have their rights protected to the nth degree. But those dangerous, radical protestors, who block the entrance to abortion mills, to stop the killing going on inside for a day and give women a chance for second thoughts about killing their babies, these people have no rights.

What happened? At least five rescuers had bones broken by the West Hartford Police and were denied medical attention until the attorney for those arrested had a doctor visit those imprisoned to decide if medical attention was necessary. Three people were then taken to a local hospital—32 hours after the injuries were inflicted. Many of those arrested had their hands bound behind their backs with oversized cable ties (large plastic

straps that can be pulled excessively tight) and then carried or dragged by these straps. One woman with a heart condition had her hands tied so brutally tight that they turned blue. People passed out from the beating and the pain inflicted by the police. Twenty-three of the rescuers, including a retired 73-year-old Catholic auxiliary bishop, were forced to stay for two nights in a courtroom building without bedding or blankets and with the air conditioning turned on to drop the room temperature even more. Fingers were bent over backward till they touched the arm. A man with a dislocated bone had his injured arm twisted by the police in the courtroom in front of the judge. In this case, justice was definitely blind because nothing was said and it was permitted to go on. And all this took place in front of large numbers of people. To top it all off, the police chief, right in front of a group of those arrested, told them they got what they deserved. It should also be mentioned here that the police who inflicted the torture during the arrests first removed their badges and name tags and refused to give their names to those arrested. When asked later why they removed their badges, the police chief said it was to protect those arrested, to keep them from getting scratched!

When some southern police departments used similar tactics during the civil rights movement in the 1960s, the mass media couldn't get enough coverage in print and on the air. We were bombarded with reports, columns, editorials, commentaries on a daily basis. Yet, with the exception of a few local news outlets, the mass media now seems to have no eyes or ears. The silence is ominous. Politicians who bend over backward to protect the civil rights of drug pushers, murderers or others like them, they, too, remain critically silent. All, of course, are hiding under the guise that it is legal to kill unborn children and so it becomes legal to do whatever harm you can to those who protest this paid killing. But during the civil rights movement, southern police officers hid

behind the guise that they were just upholding the laws of their state.

Even more ominous is the tragic similarity to Nazi Germany and Soviet Russia. In Nazi Germany, social killing started with abortion and followed to its logical conclusion—that if it is legal to kill unborn children, then it can be made legal for the state to permit the killing of anyone else they desire. Our country condemned this following World War II—and condemned the German people for not speaking out against what their leaders were doing. Yet we are now following in their footsteps. No, we are not exactly in their footsteps because we are abusing and condemning those who are protesting our actions—the very thing we said the German people should have done. In Russia, it has been well documented that civil dissent is met with physical abuse, torture, jailing under harsh and inhumane conditions. Sound familiar? But this is America—or at least it is supposed to be.

This past weekend in West Hartford was a tragic episode in the annals of civil rights. Will it wake our country up—or will we continue to travel down the pay-for-killing road that we have followed for nearly two decades and that has now escalated into the type of torture, abuse and tyranny that is justified and approved by at least one judge. West Hartford may very well become a crossroads in our country. Let us pray that we take the right turn and head back to sanity and eliminate all paid-for-killing in our society—and not take the other road which permits more and more killing for less and less reason. That second road also leads to the reduction of civil rights to any who protest that road—as was so graphically and tragically shown in West Hartford.

Supreme Court, U.S.
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(2)

No. 91-1867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

JOHN M. SPEAR and SPEAR PRINTING CO., INC.,

Petitioners,

vs.

TOWN OF WEST HARTFORD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that the Petitioners' first amendment claim failed because the Petitioners' allegations of constitutional deprivation were too conclusory and speculative to constitute a claim under 42 U.S.C. § 1983?

2. Did the court of appeals err in holding that liability under 42 U.S.C. § 1983 may not be predicated on a claim of malicious abuse of process?

3. Did the court of appeals err in holding that the Town of West Hartford's actions did not so "shock the conscience" as to violate the Petitioners' rights to due process of law?

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No. 91-1867

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OCTOBER TERM, 1991

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

I. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On August 22, 1990, the Petitioners, John M. Spear and Spear Printing Co., Inc., brought suit under 42 U.S.C. § 1983 in the United States District Court for the District of Connecticut against the Respondent, the Town of West Hartford, Connecticut, as well as West Hartford's Corporation Counsel, Marjorie S. Wilder, and West Hartford's Acting Town Manager, Robert R. McCue. The Petitioners also sued the Summit Women's Center

West, Inc, ("Summit"), a private corporation located in West Hartford.

Motions to dismiss the Petitioners' action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure were filed by all of the defendants, and were granted by the District Court in an opinion dated April 17, 1991. Judgment was entered for the defendants on April 18, 1991. *Spear v. Town of West Hartford*, 771 F. Supp. 521 (D. Conn. 1991).

The Petitioners appealed from that judgment to the United States Court of Appeals for the Second Circuit. On January 13, 1992, the Second Circuit affirmed, in its entirety, the District Court's dismissal of the Petitioners' action. On February 21, 1992, the Second Circuit denied the Petitioners' petition for rehearing *en banc*. *Spear v. Town of West Hartford*, 954 F.2d 63 (2d Cir. 1992).

The Petitioners have now petitioned this Court for a writ of certiorari, but only as to West Hartford.

B. STATEMENT OF FACTS

The Petitioners alleged the following facts in their complaint: John M. Spear is the editor of the *Orange County Post*, a weekly newspaper published in Washingtonville, New York, by the Spear Printing Company, Inc. On April 4, 1989, Spear wrote and published an editorial entitled "Northern Rednecks" in which he sharply criticized the actions of the West Hartford Police Department in attempting to disband an anti-abortion demonstration which took place in front of the Summit Women's Center in West Hartford, Connecticut on April 1, 1989. Complaint ¶¶ 5-6, 14-15 (Petitioners' Appendix ("Pet. App.") at 29a-30a, 32a).

On June 29, 1989, West Hartford filed a civil action in the United States District Court for the District of Connecticut seeking damages and seeking to prevent the demonstrators from interfering with the operations of the Summit Women's Center. *See Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371 (D. Conn. 1989).

West Hartford's complaint named eighteen defendants, including the Petitioners. In particular, West Hartford sought injunctive relief and asserted causes of action pursuant to Civil RICO, 18 U.S.C. § 1961 *et seq.*, and state tort law. West Hartford also alleged a conspiracy to interfere with civil rights. Complaint ¶ 23 (Pet. App. at 33a-34a). In regard to the Petitioners, West Hartford's complaint alleged:

> On or about Tuesday, April 4, 1989, the defendant Spear Printing Co., Inc., through its editor, the defendant John M. Spear, deliberately and maliciously published an incorrect, defamatory account of the April 1, 1989 protest based upon reports given to him by the defendant Catherine A. Jersey, another employee of the defendant Spear Printing Co., Inc., who was one of the protesters arrested by West Hartford police on April 1, 1989 at the Summit Women's Center, in furtherance of the efforts of the defendants and others to harass, intimidate and extort a less diligent or softened response from the West Hartford Police Department to future protest activities by the defendants and others at the Summit Women's Center and elsewhere within the Town of West Hartford.

Complaint ¶ 26 (Pet. App. at 34a-35a)

On September 22, 1989, Summit Women's Center filed an intervenor complaint, also naming the Petitioners. On December 6, 1989, West Hartford and Summit filed a joint amended complaint from which the Petitioners were dropped as parties. Complaint ¶ 48, 57 (Pet. App. at 39a, 40a-41a).

On August 22, 1990, the Petitioners instituted the present action against the Town of West Hartford, Corporation Counsel Wilder, Acting Town Manager McCue and the Summit Women's Center. The Petitioners alleged that their entire action was in response to the "initiation by Defendants of unconstitutional malicious, egregious and baseless wrongful civil proceedings." Complaint ¶ 1 (Pet. App. at 28a).

In particular, the Petitioners alleged that West Hartford's initiation of civil proceedings against them violated the first and fourteenth amendments to the United States Constitution and constituted vexatious litigation, libel and defamation. Complaint ¶ 58-60, 69, 73 (Pet. App. at 41a, 42a-43a). The Petitioners alleged in Paragraph 58 that:

> The said lawsuits instituted by the Town of West Hartford and the Summit Women's Center West, Inc. caused John M. Spear fear, mental anguish and worry over any potential legal liability particularly in view of the allegations of criminal acts, criminal extortion and criminal racketeering conspiracy, thereby causing a chilling effect upon his First Amendment rights of the press and speech.

(Pet. App. at 41a). In Paragraph 62, the Petitioners alleged:

> The said two lawsuits and the subsequent litigation have damaged John M. Spear and Spear Printing Co., Inc. in that they have been deprived of their rights of speech and of the press by the chilling effect of the said RICO and Hobbs Act lawsuits and particularly by their allegations of extortion, crimes and criminal racketeering conspiracy.

(Pet. App. at 41a). In Paragraph 59, the Petitioners alleged:

> The said action of the Defendants are [sic] so egregious in nature that they shock the conscience, depriving John M. Spear and Spear Printing Company, Inc. of their rights to the due process of law under the Fourteenth Amendment of the United States Constitution.

(Pet. App. at 41a).

Conspicuously absent from the Petitioners' twenty page complaint, however, were any allegations of fact which might have led one to conclude that any constitutional rights of the Petitioners, either collectively or singularly, were taken away, infringed upon or violated in any manner.

On April 17, 1991, the District Court granted the defendants' Motions to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Spear v. Town of West Hartford*, 771 F. Supp. 521 (D. Conn. 1991) (Pet. App. at 12a-25a). Specifically, the District Court held that both Corporation Counsel Wilder and Acting Town Manager McCue were absolutely immune from suit based upon their initiation of civil proceedings against the Petitioners. (Pet. App. at 15a-18a).

The District Court also held that the Petitioners failed to state a cause of action under 42 U.S.C. § 1983 against West Hartford for deprivation of their first amendment rights. In particular, the District Court stated that the Petitioners failed "to make allegations that indicate[d] a deprivation of constitutional rights," as the "chilling effect alleged by the [Petitioners was] speculative, indirect and remote." (Pet. App. at 18a-20a).

In addition, the District Court held that the Petitioners failed to state a claim under section 1983 based on a violation of substantive due process and malicious prosecution. The District Court stated that "the defendants' initiation of suit against the [Petitioners] and the meeting between the Town's attorneys, the attorneys for Summit and Leisa Montgomery, a Summit administrator, do not constitute conduct so egregious as to 'shock the conscience.' " (Pet. App. at 20a-21a).

The District Court also stated that the Petitioners failed to state a section 1983 claim predicated on malicious prosecution, because malicious prosecution can only support a section 1983 action if it is based upon the malicious initiation of a *criminal* prosecution. The District Court correctly noted that the initiation of *civil* proceedings cannot support a section 1983 action for malicious prosecution. (Pet. App. at 21a-22a). Finally, the District Court held that Summit was not a state actor, and therefore was not subject to liability pursuant to section 1983. (Pet. App. at 22a-24a).

The Petitioners then appealed from this judgment to the United States Court of Appeals for the Second Circuit. On January 13, 1992, the Second Circuit affirmed the District

Court's dismissal of the Petitioners' action as to all of the defendants. *Spear v. Town of West Hartford*, 954 F.2d 63 (2d Cir. 1992) (Pet. App. at 1a-11a).

In particular, the Second Circuit agreed with the District Court that Corporation Counsel Wilder and Acting Town Manager McCue were absolutely immune from suit, and that Summit was not a state actor and thus could not be sued under section 1983. (Pet. App. at 5a-7a, 10a-11a).

The Second Circuit also agreed with the District Court that the Petitioners' allegations of first amendment injury were too conclusory and speculative to constitute a cause of action under section 1983, and thus the Petitioners' "naked assertion of a chill [did] not suffice to defeat a Rule 12(b)(6) motion." (Pet. App. at 7a-9a).

Moreover, the Second Circuit agreed with the District Court that section 1983 liability may not be predicated on a claim for malicious abuse of process. As the Second Circuit noted, "[w]hile section 1983 liability may be predicated on a claim for malicious prosecution . . . it may not be predicated on a claim for malicious abuse of process." (Pet. App. at 9a-10a)

Finally, the Second Circuit agreed with the District Court that West Hartford's actions of meeting with Summit and bringing a civil suit against the Petitioners did not so "shock the conscience" as to violate the Petitioners' rights to due process of law. (Pet. App. at 9a).

II. REASONS WHY THE PETITIONERS' WRIT SHOULD BE DENIED.

A. THE SECOND CIRCUIT DID NOT ERR IN HOLDING THAT THE PETITIONERS' FIRST AMENDMENT CLAIM FAILED BECAUSE THE PETITIONERS' ALLEGATIONS OF CONSTITUTIONAL DEPRIVATION WERE TOO CONCLUSORY AND SPECULATIVE TO SUPPORT A CAUSE OF ACTION UNDER SECTION 1983.

The Petitioners claim that the Second Circuit erred in holding that their allegations of first amendment injury were too conclusory and speculative to support a cause of action under section 1983. The Second Circuit's holding, however, was well-supported by established constitutional doctrine and squarely in accord with prior decisions of this Court.

The Petitioners claim that simply by filing its lawsuit, West Hartford chilled their first amendment rights.[1] Despite their repeated allegations of a "chilling effect" and their claim of "fear, mental anguish and worry," the Petitioners' complaint simply gave no indication of how the Petitioners were inhibited from the exercise of their constitutional rights. In the words of the Second Circuit, "Spear's naked assertion of a chill does not suffice to defeat a Rule 12(b)(6) motion." (Pet. App. at 8a).

The Second Circuit did not hold, as the Petitioners claim, that a section 1983 plaintiff must allege "subsequent injury" to free speech. Rather, the Second Circuit held merely that a plaintiff's allegations of constitutional injury must be sufficiently specific to show that they are not merely conclusory, remote or speculative. Faced with nothing more than the Petitioners'

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[1] The Petitioners appear to have dropped their claim that the temporary restraining order issued by the District Court in *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371 (D. Conn. 1989), *vacated*, 915 F.2d 92 (2d Cir. 1990), which explicitly exempted first amendment activities, chilled their freedom of expression. This argument was rejected by both the District Court and the Second Circuit. (Pet. App. at 8a-9a, 19a-20a).

repeated incantation of the words "chilling effect," the Second Circuit had no choice but to uphold the dismissal. Indeed, it is hard to imagine an allegation more conclusory, speculative, and more of a "naked assertion." (Pet. App. at 7a-9a).

In *Laird v. Tatum*, 408 U.S. 1, *reh'g denied*, 409 U.S. 901 (1972), this Court recognized that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of *specific present objective harm or a threat of specific future harm* . . . ." 408 U.S. at 13-14 (emphasis added). Nor can the Petitioners' perfunctory allegations of mental anguish suffice to establish the "tangible consequences" required by *Laird*. *Gordon v. Warren Consolidated Bd. of Educ.*, 706 F.2d 778, 780 (6th Cir. 1983). "Subjective fear. . . is insufficient to establish a [f]irst [a]mendment claim." *Id.* at 781 (citation omitted). *See also Wade v. Goodwin*, 843 F.2d 1150, 1152 (8th Cir.), *cert. denied*, 488 U.S. 854 (1988) ("[S]peculative apprehensiveness as to future misuse of information resulting in direct harm" is subjective chill only); *United Presbyterian Church In The U.S.A. v. Reagan*, 738 F.2d 1375, 1378-80 (D.C. Cir. 1984) (Fear of illegal surveillance does not constitute cognizable harm under first amendment and therefore is not remediable).

Laird makes clear that if a court were to permit allegations of "subjective chill" to constitute a cognizable claim, then the court would eventually be forced to render an advisory opinion in contravention of Article III of the United States Constitution. 408 U.S. at 14. Without specific allegations indicating a constitutional deprivation, the Petitioners' section 1983 complaint failed to state a justiciable controversy under Article III. "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.' " *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (*quoting Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)). *See also Warth v. Seldin*, 422 U.S. 490, 501 (1975) (Injury or threat must be "distinct and palpable"); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 221 (1974) (Injury or threat must be "concrete").

The cases relied upon by the Petitioners simply do not address the issue of whether a section 1983 complaint has been pleaded with sufficient specificity. Moreover, each case involves a plaintiff who suffered specific, demonstrable harm. *See Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979) (Plaintiff lost her job in retaliation for her expression of opinion); *Carey v. Piphus*, 435 U.S. 247 (1978) (Students suspended from school without due process); *Glasson v. City of Louisville*, 518 F.2d 899 (6th Cir.), *cert. denied*, 423 U.S. 930 (1975) (Plaintiff's protest sign seized and destroyed).

Because the Second Circuit's holding was firmly based on established constitutional law, this Court should not grant certiorari on this ground.

B. THE SECOND CIRCUIT DID NOT ERR IN HOLDING THAT LIABILITY UNDER SECTION 1983 MAY NOT BE PREDICATED ON A CLAIM OF MALICIOUS ABUSE OF PROCESS.

The Petitioners claim that the Second Circuit erred in holding that liability under section 1983 may not be predicated on a claim of malicious abuse of process, as opposed to malicious prosecution. Yet, despite their assertion that there is a split among the circuits on this issue, the Petitioners fail to cite a single case holding that malicious abuse of process – vexatious initiation of *civil* litigation – may serve as the basis of a section 1983 claim.

Because "Spear was subject only to civil, not criminal liability," the Second Circuit held:

> any abuse would have been malicious abuse of process rather than malicious prosecution. While section 1983 liability may be predicated on a claim for malicious prosecution, *e.g.*, *White v. Frank*, 855 F.2d 956, 961 n.5 (2d Cir. 1988), it may not be predicated on a claim for malicious abuse of process. *E.g.*, *Havas v. Thornton*, 609 F.2d 372, 376 (9th Cir. 1979).

(Pet. App. at 9a-10a).

Nor is this holding a "novel" departure from established case law, as the Petitioners claim. Indeed, "courts that have recognized that malicious prosecution may support a section 1983 claim are virtually unanimous in holding that constitutional protection exists only with respect to criminal proceedings and not to civil proceedings." *McMaster v. Cabinet for Human Resources*, 824 F.2d 518, 522 (6th Cir. 1987). *See Coogan v. City of Wixom*, 820 F.2d 170, 174-75 (6th Cir. 1987).

No case cited by the Petitioners holds otherwise. The Petitioners cite *Beker Phosphate Corp. v. Muirhead*, 581 F.2d 1187 (5th Cir. 1978), yet this case held that the plaintiff's claim of misuse of civil legal procedure could *not* be remedied under section 1983. *Id.* at 1189. The Petitioners also rely on *Tarkowski v. County of Lake*, 775 F.2d 173 (7th Cir. 1985); in that case, however, the court explicitly refrained from ruling on whether malicious abuse of process is actionable under section 1983, and held only that the litigation in question was not baseless. *Id.* at 174-75. In *Andree v. Ashland County*, 818 F.2d 1306 (7th Cir. 1987), also cited by the Petitioners, the court refused to provide a remedy under section 1983, holding that "the mere unsuccessful attempt to secure an injunction under an allegedly unconstitutional ordinance does not itself make out a deprivation of constitutional rights." *Id.* at 1312.

Finally, the Petitioners' reliance on *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544 (5th Cir. 1988) is equally misplaced. In fact, the trial court's ruling in *Howard Gault*, left intact after appeal, was that "[t]o the extent that [the claimant's] malicious prosecution claim is cognizable under §1983, [. . .], *he cannot prevail because the state court proceeding was civil, not criminal.*" 615 F. Supp. 916, 938 (D. Tex. 1985) (emphasis added). The application of section 1983 to malicious prosecution claims, the district court held, rests "on the protections afforded criminal defendants by the Fourth and Fourteenth Amendments, protections that do not extend to defendants in civil suits even if the civil action is brought by persons acting under color of state law." 615 F. Supp. at 938 (citing *Beker Phosphate Corp. v. Muirhead*, 581 F.2d 1187 (5th Cir. 1978)).

The district court in *Howard Gault* did provide relief to the claimant under section 1983, but *not* on the claim of malicious prosecution. Rather, the claimant was awarded $500 on the separate claim that his first amendment rights were violated by the issuance of an unconstitutional temporary restraining order. The district court distinguished between the issuance of the unconstitutional TRO, which provided the basis for a section 1983 claim, and the claim of malicious prosecution of civil litigation, which did not. 615 F. Supp. at 938. The district court's ruling on the TRO was upheld by the Fifth Circuit, in the opinion cited by the petitioner. 848 F.2d 544. The district court's ruling on the malicious prosecution claim, however, was apparently not even raised on appeal, and was not addressed by the circuit court.

The Petitioners have failed to cite a single circuit, or even a single case, holding that section 1983 liability may be predicated on a claim of malicious abuse of process. It is well-established in federal constitutional case law that only malicious prosecution—involving criminal, not civil, litigation—may serve as the basis of a section 1983 claim. Thus, this Court should not grant certiorari on this ground.

C. THE SECOND CIRCUIT DID NOT ERR IN HOLDING THAT WEST HARTFORD'S ACTIONS DID NOT SO "SHOCK THE CONSCIENCE" AS TO VIOLATE THE PETITIONERS' RIGHTS TO DUE PROCESS OF LAW.

The Petitioners claim that the Second Circuit erred in holding that West Hartford's actions did not so "shock the conscience" as to violate the Petitioners' fourteenth amendment rights to due process. It is abundantly clear, however, that West Hartford's conduct did not even remotely approach the "shock the conscience" standard.

"A substantive due process claim does not require that a specific constitutional guarantee be violated; but it does require that the actions alleged be such as to 'shock the conscience,' offend the 'concept of ordered liberty,' or suggest 'outrageousness.' *Baker v. McCollan*, 443 U.S. 137, 147 [. . .] (1979) (Blackmun,

J., concurring). Unless the alleged conduct is so egregious as to violate 'a principle of justice so rooted in the conditions and conscience of our people as to be ranked as fundamental,' *Snyder v. Massachusetts*, 291 U.S. 97, 105 [. . .] (1934), it does not violate substantive due process and will not support a claim cognizable under §1983. *See Baker v. McCollan*, 443 U.S. at 146-47 [. . .]." *AGI-Bluff Manor, Inc. v. Reagen*, 713 F. Supp. 1535, 1544 (W.D. Mo. 1989).

Conduct that has been found to "shock the conscience" generally has been maliciously and sadistically aimed at prisoners or detainees for the purpose of causing fear or harm. *See, e.g., Johnson v. Glick*, 481 F.2d 1028, 1029-33 (2d Cir.), *cert. denied sub nom. Employee-Officer John v. Johnson*, 414 U.S. 1033 (1973) (corrections officer struck and threatened to kill pretrial detainee). *Rochin v. California*, 342 U.S. 165 (1952), illustrates the application of this high threshold for substantive due process claims. In *Rochin*, a criminal suspect placed some capsules in his mouth during arrest. Police officers took him to a hospital where the suspect was forced against his will to take an emetic which caused him to vomit the capsules, which were then found to contain narcotics. *Id.* at 166. This Court denounced the conduct of "[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, and the forcible extraction of his stomach's contents. . ." as shocking to the conscience. *Id.* at 172.

The outrageous actions of law enforcement personnel in the aforementioned cases stand in sharp contrast to the events that constitute the basis of the instant action. As the Second Circuit correctly held, "[t]he district court reasonably concluded that West Hartford's actions in meeting with Summit and suing Spear fell short of [the 'shock the conscience'] standard." (Pet. App. at 9a). Thus, this Court should not grant certiorari on this basis.

III. CONCLUSION

For the several reasons already stated, the Petitioners' petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHN M. SPEAR and SPEAR PRINTING CO., INC.,
Petitioners,

v.

TOWN OF WEST HARTFORD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a town's deliberate filing of a frivolous RICO suit against a newspaper editor and publisher, predicated solely upon the allegedly "extortionate" publication of an editorial criticizing the town, violate the first amendment?

2. Is malicious government prosecution of a frivolous civil lawsuit in retaliation for the exercise of first amendment rights actionable under 42 U.S.C. § 1983?

3. Does a town's deliberate filing of a frivolous RICO suit against a newspaper editor and publisher, predicated solely upon the allegedly "extortionate" publication of an editorial criticizing the town, "shock the conscience" for purposes of a due process claim under the fourteenth amendment?

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REPLY TO BRIEF IN OPPOSITION

The petition for certiorari in this case raises the question whether a federal remedy exists when a municipality, in response to the publication of an editorial sharply criticizing that municipality, subjects a newspaper editor and publisher [1] to a frivolous civil RICO suit based solely upon that editorial.

The respondent Town of West Hartford has not contested the facts of this case. At issue, then, are the three legal questions posed in the petition for certiorari. Pet. at i.

These questions address petitioners' three separate theories of federal relief: 1) for violation of the first amendment; 2) for malicious civil litigation by govern-

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[1] Petitioner Spear Printing Company, Inc., is a corporation with no parent companies or subsidiaries. *See* Sup. Ct. R. 29.1.

ment; and, 3) for violation of due process. The petition for certiorari, addressing these questions in turn, demonstrates the dramatic departure of the Second Circuit's decision from the precedents of this Court as well as from the decisions of other federal courts of appeals. As shown in the present reply brief, respondent has given no sound reason for denying review.

I. THE SECOND CIRCUIT CREATED A NEW AND ADDITIONAL ELEMENT FOR ASSERTED *PAST* VIOLATIONS OF FIRST AMENDMENT RIGHTS BY REQUIRING A PLAINTIFF TO ALLEGE *SUBSEQUENT* INJURY TO FREE SPEECH.

Petitioner John Spear, editor of the *Orange County Post* (a weekly newspaper), published an editorial accusing the respondent Town of West Hartford (hereinafter "the town") of police brutality. The town responded by suing Spear and the *Post's* publisher, respondent Spear Printing Co. (hereinafter collectively "Spear"), under the federal RICO statute, alleging that the publication of the editorial constituted federal criminal extortion (a predicate offense under RICO).

This absurd RICO extortion claim was entirely frivolous, was filed solely in response to a classic exercise of rights of free speech and free press, and caused Spear concrete damages in the form both of legal defense fees incurred and fear, mental anguish, and worry suffered. *See* Pet. at 4.

Spear therefore has a valid cause of action, under 42 U.S.C. § 1983, for a violation of first amendment rights and the infliction thereby of both compensable and nominal damage. *Carey v. Piphus*, 435 U.S. 247, 255, 264 (1978). *See* Pet. at 8-9.

The Second Circuit disallowed Spear's federal civil rights claim by disregarding Spear's allegations of concrete injury and imposing instead a requirement that Spear, unlike every other federal civil rights claimant

seeking damages, must allege the *subsequent* loss of first amendment rights. Pet. § I.

The town's assertion that Spear alleged no more than that he suffered a subjective "chilling effect" on speech, Brief in Opp. at 7-8, is patently false, *see* Complaint ¶¶ 22, 56, 58, 71 (App. 33a, 40a, 41a, 43a) (allegations of concrete monetary and mental injury). The town's attempt to shoe-horn this case into the factual scenario of *Laird v. Tatum*, 408 U.S. 1 (1972), is likewise erroneous.

Laird and the lower court cases the town cites all dealt with plaintiffs who challenged governmental surveillance or information-gathering, where the plaintiffs suffered *no concrete injury whatsoever.*

The rule of *Laird* and cases following it is that a plaintiff lacks standing when the only injury plaintiff alleges is the fear that a governmental body "might in the future take some *other* and additional action detrimental to the individual." *Id.* at 11 (emphasis in original). *Laird* did *not* disturb, and in fact explicitly acknowledged, the "established principle" that a plaintiff who "has sustained . . . a direct injury as the result of [the challenged] action" has standing. *Id.* at 13 (citation and internal quotation marks omitted).

In the present case, Spear has suffered—and alleged—a "direct injury," namely, monetary damages and mental distress. Pet. at 4, 8-9. *Laird* is therefore inapposite.

The Second Circuit required Spear to plead not only that he suffered financial and mental injury for the exercise of his right to free speech and free press but also that he "declined to write" or "toned down his writing" in *subsequent* editorials. This novel requirement of "future injury to speech" is completely unprecedented. *See* Pet. at 9. This Court should grant review to consider the Second Circuit's major departure from the prior decisions of this Court.

II. THE SECOND CIRCUIT'S HOLDING, THAT VEXATIOUS CIVIL LITIGATION BY GOVERNMENTAL BODIES IS CATEGORICALLY OUTSIDE THE SCOPE OF § 1983, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The Second Circuit categorically excluded, from the scope of 42 U.S.C. § 1983, actions to redress malicious civil litigation by government, even when that malicious litigation penalizes the exercise of a constitutional right. 954 F.2d at 68 (App. 10a). As demonstrated in the petition for certiorari, this novel *per se* rule conflicts with the rule in other federal circuits, specifically the Fifth [2] and Seventh Circuits. *See* Pet. § II (citing authorities).

The Second Circuit cited only one case in support of its blanket rule. 954 F.2d at 68 (App. 10a). This case does not support the Second Circuit's novel rule, Pet. at 11 n.10, and the town does not pretend to argue that it does.

Instead, the town cites other cases which hold that malicious government litigation—*whether civil or criminal*—does not give rise *without more* to a cause of action under § 1983. *E.g., Coogan v. City of Wixom*, 820 F.2d 170, 174-75 (6th Cir. 1987) (malicious criminal prosecution); *Beker Phosphate Corp. v. Muirhead*, 581 F.2d 1187, 1189 (5th Cir. 1978) (per curiam) (malicious civil litigation). These cases *do not* embrace any categorical distinction between malicious civil and criminal litigation

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[2] The Fifth Circuit explicitly affirmed, in *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544 (5th Cir. 1988), an award of damages for the improper use of civil litigation to suppress first amendment rights, *id.* at 557 (unconstitutional TRO against picketing). *See* Pet. at 10-11 & n.8. The town attempts to distinguish this specific holding by quoting unrelated language from the district court decision in *Howard Gault*, 615 F. Supp. 916, 938 (N.D. Tex. 1985). *See* Brief in Opp. at 10-11. But in the quoted portion of the district court's opinion in *Howard Gault*, that court merely restated the rule, discussed *infra*, that malicious litigation *without more* is not actionable under § 1983. 615 F. Supp. at 938.

and therefore *do not* support the Second Circuit's *per se* rule. On the contrary, these cases explicitly anticipate that frivolous government litigation which *infringes a constitutional right* is actionable under § 1983. *E.g.*, *Beker*, 581 F.2d at 1189 (malicious civil litigation) ("misuse of legal procedure may be so egregious as to constitute a violation of Section 1983 . . . if the tort-feasor, under color of state law, subjects the tort-victim to a deprivation of Constitutional dimension") (citing cases).[3] *Accord Coogan*, 820 F.2d at 175 (malicious criminal prosecution). Indeed, this Court's recent decision in *Wyatt v. Cole*, 60 U.S.L.W. 4383 (U.S. May 18, 1992), assumes the actionability of both malicious (criminal) prosecution and abuse of (civil) process under § 1983, *see id.* at 4385 & n.2.

The town's primary authority for the Second Circuit's *per se* rule is a single dictum quoted out of context from *McMaster v. Cabinet for Human Resources*, 824 F.2d 518, 522 (6th Cir. 1987). But in *McMaster* the parties agreed, and the court of appeals did not dispute, that "malicious prosecution may, in an appropriate case, support a section 1983 action," even where the alleged malicious litigaiton was *not* a criminal prosecution. *Id.* at 520 (malicious administrative proceedings). The *McMaster* court accurately observed, in the dictum the town quotes, that as a matter of *fact* § 1983 suits almost always involve malicious *criminal* prosecution, *id.* at 522. But this is by no means tantamount to a *legal holding* that malicious *civil* litigation is never actionable. The *McMaster* court specifically cites in support of its dictum a treatise, S. Nahmod, *Civil Rights and Civil Liberties Litigation* § 3.10, at 155 nn.181-82 (2d ed. 1985), which treatise provides:

> Currently, there is some dispute in the circuits about the *nature and scope* of these § 1983 malicious prose-

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[3] The town ignores this explicit language in attempting to explain away *Beker*. Brief in Opp. at 10.

> cution and *abuse of process* actions.[181] Nevertheless, the majority of the circuits *acknowledge the possibility of such § 1983 actions.*[182]

Id. (emphasis added). This treatise, in short, is authority *in support of Spear* and *in conflict with the Second Circuit's rigid per se rule.* The *McMaster* dictum, relying upon this treatise, is certainly no authority for the Second Circuit's blanket rule against malicious civil litigation claims under § 1983.

The Second Circuit's *per se* rejection of § 1983 relief against malicious governmental civil litigation, even where (as here) the frivolous governmental litigation directly penalizes the exercise of constitutional rights, represents a dramatic departure from the decisions of other federal circuits. This Court should grant review and resolve this conflict in the circuits before the Second Circuit's erroneous ruling spawns further precedential disarray.

III. THE SECOND CIRCUIT ADOPTED AN EXTREME CONSTRUCTION OF THE "SHOCK THE CONSCIENCE" ELEMENT OF A DUE PROCESS CLAIM.

The Second Circuit held that it does not "shock the conscience" for a town to file a frivolous RICO suit accusing a newspaper editor and publisher of federal criminal exortion solely on the basis of an editorial criticizing the town. The Second Circuit on this basis disallowed Spear's federal civil rights claim under the liberty clause of the fourteenth amendment. 954 F.2d at 68 (App. 9a).

The town essentially does no more than assert its agreement with the Second Circuit's ruling. Brief in Opp. at 11-12. But the patent outrageousness of the town's malicious punishment of the mere printing of a newspaper editorial speaks for itself.

This Court should grant the present petition to review the Second Circuit's miserly construction of the liberty guarantee of the fourteenth amendment.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition for Writ of Certiorari, this Court should grant review in the present case.

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